(18,789.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 5, 1903.

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a *Caption.*

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court room of said court, in the city of New Orleans, before the Honorable Don A. Pardee and the Honorable A. P. McCormick and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

HENRY CHARMOCK, Plaintiff in Error,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1082.

Be it remembered that heretofore, to-wit: on the 13th day of July, 1901, a transcript of the record of the above styled cause from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

HENRY CHARNOCK, Plaintiff in Error,
versus
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 12944.

Branch K. Miller, Esquire, for plaintiff in error.
Howe, Spencer & Cocke, Esquires, for the defendant in error.

Writ of error to the circuit court of the United States for the eastern district of Louisiana (New Orleans division) from the United States circuit court of appeals for the fifth circuit, returnable within thirty (30) days from the fifteenth (15th) day of June, A. D. 1901, at the city of New Orleans, State of Louisiana.

Transcript of Record.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

Transcript. Filed April 3, 1901.

2 *Proceedings in Civil District Court, Parish of Orleans.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILROAD COMPANY. } No. 64511.

Civil district court, parish of Orleans, division "B," Hon. Fred. D. King, judge.

Transcript of removal from the civil district court for the parish of Orleans into the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division.

Branch K. Miller, Esq., attorney for plaintiff.
Messrs. Howe, Spencer & Cocke, attorneys for defendant.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans, Division "B," Hon. Fred D. King, Judge.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC R. R. COMPANY. } No. 64511.

Petition.

Filed March 18, 1901.

To the honorable the judges of the civil district court in and for the parish of Orleans:

The petition of Henry Charnock, who resides in the city of New Orleans, respectfully shows:

That the Texas & Pacific Railroad Company, a corporation created

by or organized under the laws of Congress, domiciled in the city of Dallas, State of Texas, and engaged in the State of Louisiana in the business of a common carrier, and having an agent residing
3 in this city, with authority to receive citation, and stand in judgment for it, is justly and truly indebted unto your petitioner in the full sum of two thousand four hundred and forty dollars, and thirty-two cents, with legal interest from judicial demand, for this, to wit:

That on December 26, 1900, your petitioner, through his agent, then and there acting, at Meekers switch, a point on the line of railway of the said company, in the parish of Rapides, delivered to the said company, for carriage by it, from said Meekers switch to your petitioner, at the city of New Orleans, to which the said company's line of railway extended, fifty-two bales of cotton, to be carried as aforesaid, for a rate of freight then and there agreed upon.

That the said company, then and there, delivered to the said agent of your petitioner, its bill of lading, for the carriage of said cotton, from Meekers switch, by which it agreed and bound itself to carry the said fifty-two bales of cotton as aforesaid.

That the said cotton after it had been received by the said company, as a common carrier, and while it was in its possession as such, for transportation as aforesaid, from said Meekers switch, to New Orleans, and after the said bill of lading for the said cotton, had been issued by said company, and by it delivered to petitioner, through his said agent, all of the said cotton with the exception of one bale thereof, was destroyed by fire, while the same was loaded upon the cars of the said company, and standing upon its track, at said Meekers switch, awaiting carriage as aforesaid.

That by a certain clause in said bill of lading, the said company attempted to limit the liability, as a common carrier, by a provision that it would not be liable for any damage to, or destruction of the said cotton by fire.

That the said clause of said bill of lading does not bind your petitioner, and is null and void, and the same as though it was not contained in said bill of lading, so far as concerns him, petitioner, and this, without prejudice or waiver, or other grounds upon which the said clause may be held not binding upon petitioner, for the following causes and reasons, to-wit:

First. That petitioner received from the said company no consideration of any character whatsoever for the inclusion of said clause in the said bill of lading; that he received no consideration of any character whatsoever, sufficient to uphold an agreement, restricting or limiting the liability of said company, as it exists under the common law.

Second. That the stipulated freight, which petitioner agreed
4 to pay, and which said company charged for the carriage of said cotton, was the only rate that it would give, or was offered, or could have been obtained by petitioner for the carriage of said cotton, from said Meekers to New Orleans.

Third. That the fire, by which the destruction of said cotton was

caused, was due to the negligence of the said company itself, and of its agents, employés and servants; that the said cotton was by it left in two cars of the said company, standing upon its track, in the open country, ungarded and unwatched by the said company, in any particular whatsoever; that it was the duty of the said company to take some measures of precaution to protect said cars, and the cotton contained therein, from depredation, loss or injury, by third persons, wrong doers or those bent upon mischief; that it totally failed and neglected to take any measures of precaution, for the safety and protection of the said cotton, but left it in said cars, said track, ungarded and unwatched in the night time during which it was destroyed by fire; that petitioner believes, that the said cotton was set on fire by some malicious person; that petitioner has no actual knowledge as to the origin or cause of said fire; that the value of said cotton at the time of its destruction, and its value at New Orleans, if delivered there, as was contracted by the said company, was two thousand four hundred and forty dollars and thirty-two cents.

Petitioner avers amicable demand without avail.

Wherefore petitioner prays that the said Texas & Pacific Railroad Company, through its proper officers, be duly cited to answer this petition, and that after due proceedings, petitioner have and recover judgment against the said company for the said sum of two thousand four hundred and forty dollars and thirty-two cents, with legal interest from judicial demand, for costs, and for general relief.

(Signed) BRANCH K. MILLER,
Attorney for Petitioner.

Copy of Citation, with Sheriff's Return Thereon.

Filed March 28, 1901.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

5 HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILROAD COMPANY. } No. 64511.

To the Texas & Pacific Railroad Company, through its proper officers, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which copy accompanies the citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans, within ten days after the service thereof.

Witness the Honorable T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville, judges of the said court, this 18th day of March in the year of our Lord 1901.

(Signed) A. M. BURKE,
Deputy Clerk.

Court house opposite Jackson square.

(Indorsement and sheriff's return on citation:) Docket No. 4 No. 64511. Civil district court, for the parish of Orleans. Henry Charnock *vs.* Texas & Pacific R. R. Company. Branch K. Miller, attorney. Copy of petition and citation inside to be served on the Texas & Pacific Railroad Company, through its proper officers, New Orleans.

Received Monday, Mar. 18, 1901, and on the 26th day of March, 1901, I served a copy of the within citation and accompanying petition on The Texas & Pacific Railroad Company, defendant herein, by leaving the same at their office No. 209 St. Charles street in the hands of W. R. Elliot, a clerk, Robert Strong, its duly authorized agent, being absent from the city time of service.

Returned same day.

(Signed) C. M. GOSS,
Deputy Sheriff.

Petition, Affidavit, Bond, and Order for Removal.

Filed March 29th, 1901.

Civil District Court, Parish of Orleans Division.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 64511.

6 To the honorable the judges of the court:

The petition of The Texas & Pacific Railway Company, defendant in the above entitled and numbered cause, with respect, represents:

That your petitioner, The Texas & Pacific Railway Company, was, prior to the beginning of this suit, and now is a corporation created by and organized under and by virtue of certain acts of Congress of the United States, to-wit:

First. "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes." Approved March 3, 1871, being chapter 122 of the Public Laws of the United States of 1871.

Second. An act supplemental to the foregoing act, approved May 2, 1872, being chapter 132 of the Public Laws of the United States of 1872.

Third. An act supplemental to the act of 1871, approved March 3,

1873, being chapter 257 of the Public Laws of the United States of the year 1873.

Fourth. An act supplemental to said act of 1871, approved June 22, 1874, being chapter 476 of the Public Laws of the United States of the year 1874.

That the Southern Pacific Railway Company of Texas, created by act of the legislature of that State of February 16, 1856, and the Southern Transcontinental Railway Company of Texas, created by act of the legislature of said State of July 27, 1870, were, prior to the said 22d day of June, 1874, merged in and consolidated with the said The Texas & Pacific Railway Company, and your petitioner, the said Texas & Pacific Railway Company, acquired and now owns all the property, rights, powers, privileges and franchises of the said Southern Pacific Railway Company and Southern Transcontinental Railway Company, and such acquisition and consolidation were recognized, affirmed and approved by said act of Congress of June 22, 1874.

That under the powers thus conferred and confirmed by said acts of Congress of the United States, your petitioner has acquired, completed, possessed and operated its railway from El Paso, in the State of Texas, to New Orleans, Louisiana, passing through the parish of Rapides, and has been thus operating the same upwards of fifteen years last past, being the same line of railway concerning which allegations are made by the plaintiff in the petition in this cause, and the said railway is operated and used as a medium of interstate commerce, and for the transportation of the United States mail.

7 That your petitioner has, on the 26th day of March, 1901, been served with process and cited to appear before this honorable court in this cause, and this petition for removal is made and filed before petitioner and defendant in this cause, is required by the laws of this State and rules of this court, to answer and plead to the petition, declaration or complaint of the plaintiff, and the matter in dispute in this cause exceeds, exclusive of interests and costs, the sum and value of two thousand dollars.

That the said suit arises under the Constitution and laws of the United States, and that the controversy between the plaintiff and the defendant herein arises under and is to be determined by the laws of the United States, and especially under the acts of Congress above cited, the rights, immunities and exemptions conferred by which, this petitioner, defendant in this cause, especially claims herein.

That your petitioner, the said The Texas & Pacific Railway Company, is desirous of removing this cause to the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division, and your petitioner offers and files herewith bond with good and sufficient surety, according to law, for its entering in said circuit court of the United States on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said court, if said court should hold

that this suit was wrongfully or improperly removed thereto, and for appearing and entering special bail there if the same be required, and otherwise conditional according to law.

Wherefore, petitioner prays this honorable court to proceed no further herein except to make order of removal required by law, and to except this petition and the said bond and surety, and to cause the record herein to be removed into said circuit court of the United States in and for the fifth circuit and eastern district of Louisiana, New Orleans division, and for all necessary orders, and for general relief.

(Signed) HOWE, SPENCER & COCKE,
Att'ys T. & P. R'y Co., Pet'r.

STATE OF LOUISIANA, } ss:
Parish of Orleans, }

Waggaman R. Elliot of the city of New Orleans, being duly sworn, says, that he is the agent for Louisiana of the Texas & Pacific Railway Company, on whom process was served in this cause from the civil district court, and that the foregoing petition is just and true.

(Signed) WAGGAMAN R. ELLIOT.

8 Sworn to and subscribed before me this 28th day of March, A. D. 1901.

(Signed) J. G. EUSTIS,
[SEAL.] *Notary Public.*

Bond for Removal.

Filed March 29th, 1901.

Civil District Court, Parish of Orleans Division.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 64511.

Bond for removal.

Know all men by these presents, that we, The Texas & Pacific Railway Company as principal, and William W. Howe, of New Orleans, as surety, are held and firmly bound unto Henry Charnock, and all other persons whom it may concern, in the penal sum of five hundred dollars ($500.00), to which we bind ourselves jointly and severally by these presents.

This dated and signed at New Orleans, La., this 29th day of March, 1901.

The condition of the above obligation is such, that, whereas the said The Texas & Pacific Railway Company has applied to the civil district court for the parish of Orleans to remove a certain cause therein pending, wherein Henry Charnock is plaintiff, and The Texas

& Pacific Railway Company is defendant, from the civil district court for the parish of Orleans to the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division.

Now, therefore, if the said The Texas & Pacific Railway Company, shall enter in said circuit court of the United States for the eastern district of Louisiana on the first day of the next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said circuit court, if it shall be held that said suit was wrongfully or improperly removed, thereto, and shall also appear and enter special bail in said circuit court in said suit, if special bail was originally required therein, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) TEXAS & PACIFIC RAILWAY COMPANY.
W. R. ELLIOT, *Agent.*
W. W. HOWE.

9 PARISH OF ORLEANS, *ss:*

Affidavit.

William W. Howe, of the city of New Orleans, being duly sworn, says that he is the surety of the foregoing bond, and that he is worth the sum of five hundred dollars ($500) over and above all his debts and liabilities and property exempt by law from execution.

(Signed) W. W. HOWE.

Sworn to and subscribed before me on this 28th day of March, A. D. 1901.

[SEAL.] (Signed) J. G. EUSTIS, *Not. Pub.*

Order.

On consideration of the foregoing petition and bond, it is ordered that the said petition and bond be, and the same are hereby accepted, and that this court proceed no further in said suit, and that the same be removed to the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division, as prayed for in said petition, and according to the statutes in such cases made and provided.

(Signed) FRED D. KING, *Judge.*

New Orleans, March 29th, 1901.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, William B. Murphy, deputy clerk of the civil district court for the parish of Orleans, do hereby certify the foregoing nine (9) pages do contain a true and complete transcript of all the proceedings had, in and evidence adduced upon the trial of the cause wherein Henry Charnock is plaintiff and Texas & Pacific Railroad Company is defendant, instituted in this court and now in the records thereof under the No. 64511 of the docket thereof, Div. B, the Honorable Fred D. King, judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this second day of April in the year of our Lord one thousand nine hundred and one (1901), and in the one hundred and twenty-fifth year of the Independence of the United States of America.

(Signed) W. B. MURPHY,
Deputy Clerk.

Answer.

Filed April 29, 1901.

U. S. Circuit Court, Eastern District of Louisiana, at N. O.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 64511.

Now into court, through undersigned counsel, comes The Texas & Pacific Railway Company, made defendant in the above entitled and numbered cause, and for answer thereto, says:

1st. It denies all and singular the allegations in said petition contained except such as may hereinafter be expressly admitted. Defendant admits that on or about the 26th day of December, 1900, your defendant received and undertook to transport and deliver upon terms and conditions expressed in certain contracts or bills of lading which were then and there entered into between this defendant and the agent of the plaintiff, and admits that said cotton was destroyed by fire while in the possession of this defendant, but denies all and singular the other allegations of the petition in reference thereto.

2d. Defendant avers that said cotton was shipped as aforesaid under certain bills of lading evidencing a contract between the shipper and this defendant, whereby it was agreed, among other things, that this defendant should not be liable for any damage or detriment done to said cotton by fire, and defendant specially pleads and claims the benefit of said exception, and also all other terms and stipulations of said contracts which are here referred to and made part of this answer as fully as if set forth at length herein, and defendant will produce and offer said contracts upon the trial of this cause.

3d. Defendant expressly denies that the plaintiff has any real or actual interest which he pursues in this suit, or that he is entitled to recover anything of this defendant herein, in as much as prior to the institution of this suit, said plaintiff had assigned or parted with all interest of whatsoever nature that he might have had in
11 said demand or claim against his defendant to an insurance company or companies whose names are now unknown to this defendant. And by reason of such assignment, the plaintiff can take nothing herein.

Wherefore, the premises considered, defendant prays that the plaintiff's suit may be dismissed at his costs, and for general relief.

(Signed) HOWE, SPENCER & COCKE,
Attorneys for Defendant.

April 29, 1901.—Motion to set down cause on the trial docket entered and filed, and cause fixed for May 13th, 1901.

Case Called, Jury Empaneled, Hearing of Pleadings, Evidence and Testimony, and Continuance.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, MONDAY, *May* 13th, 1901.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 12944.

This cause was called for trial.

Present: Branch K. Miller, attorney for plaintiff, Howe, Spencer & Cocke, for defendant.

Whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. James A. Douglas,
2. Chas. F. Frink,
3. Joe. P. Buckley,
4. Jno. B. Steiner,
5. T. A. Faries,
6. J. S. Barnes,
7. Geo. Redersheimer,
8. Wm. Gorman,
9. Wm. H. Jurgens,
10. C. E. Staub,
11. W. S. McCann,
12. Gottlieb Huber,

when the court appointed James A. Douglas foreman of the jury and the trial was proceeded with.

After hearing pleadings, evidence and testimony, it was ordered that the cause be continued until to-morrow at 11 a. m.

12 *Case Resumed—Verdict Directed for Defendant.*

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, TUESDAY, *May* 14, 1901.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, district judge.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

This cause as continued from yesterday was this day resumed, and the counsel for the respective parties, as well as the jurors empaneled in the cause, being all present, the trial was proceeded with.

After hearing the charge of the court, the said jury did then and there in open court, under instructions from the court, render and deliver the following verdict, to-wit:

We, the jury, find a verdict in favor of the defendant.
May 14, 1901.

JAMES A. DOUGLASS, *Foreman.*

Whereupon it was ordered that the said verdict be recorded and it is done accordingly.

Order: Counsel for Plaintiff Allowed 15 *Days to Present Bills of Exceptions.*

Extract from the Minutes.

TUESDAY, *May* 14*th*, 1901.

HENRY CHARNOCK
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 12944.

Ordered: That counsel for the plaintiff herein be allowed 15 days to prepare and present his bills of exceptions in this cause.

13 *Application for New Trial.*

Filed May 17, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

On motion of Branch K. Miller, attorney for plaintiff, it is ordered that defendant show cause on the 25 day of May, 1901, why a new trial should not be granted herein, on the following grounds, to-wit:

1st. That the verdict of the jury and the judgment of the court, founded thereon, were contrary to the law and evidence.

2nd. That plaintiff, having proven that after his cotton was received by defendant, as a common carrier, for transportation from Meeker Switch to New Orleans, Louisiana, and after it had issued its bill of lading for said transportation, allowed said cotton to remain in its cars, which by it had been sent to Meeker Switch to receive said cotton, in an open field without enclosure, in the night time, unguarded and unprotected, the burden of proof was then upon defendant to show that the said cotton was not destroyed by fire in consequence of its negligence.

3rd. That the burden of proof was upon defendant to show not only that the destruction of said cotton was due to a cause for which its liability was excluded by the terms of its (—) with plaintiff, but also that the destruction of said cotton by fire was in no respect due to its, defendant's, negligence; that defendant offered no testimony or evidence to establish said want of negligence on its part.

4th. That for defendant to allow said cotton to remain in its cars in an open, unprotected place, in the night time, unguarded or otherwise unprotected from injury or destruction by third persons, was in itself an act of negligence for which it was incompetent to exclude its liability by any contract or stipulation.

5th. That no consideration for said contract exempting it from liability for loss of or damage to said cotton by fire was shown by defendant; that said consideration has been denied by plaintiff's petition; that the burden of proof was thus placed upon defendant, that they offered no proof to show that such consideration did exist.

14 Service accepted:

(Signed) HOWE, SPENCER & COCKE,
Att'ys — Def't.

Order on Rule for New Trial.

Extract from the Minutes.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, FRIDAY, *May 17th*, 1901.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, district judge.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

On motion of Branch K. Miller, attorney for plaintiff:
It is ordered that defendant show cause on the 25th day of May, 1901, why a new trial should not be granted herein on the grounds filed.

Hearing and Submission of Rule for New Trial.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, SATURDAY, *May 25th*, 1901.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, district judge.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

The rule for a new trial filed herein by plaintiff, came on to be heard; B. K. Miller, appearing for mover; Howe, Spencer & Cocke, for defendant; and was argued and submitted, when the court took time to consider.

15 *Petition for Additional Delay in which to Have Signed and File Bills of Exception Taken Herein.*

Entered and Filed May 29, 1901.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

To the honorable the judges of the circuit court for the eastern district of Louisiana:

The petition of Henry Charnock, plaintiff herein, respectfully shows:

That there is now under advisement, in the hands of the court, an application for a new trial herein; that the said application is as yet undecided and undisposed of; that plaintiff desires a further delay of fifteen days, within which to prepare and have signed the bills of exception taken on the trial of this case.

Wherefore, petitioner prays that he be allowed an additional delay of ten (10) days, besides the delay already prayed for, within which to prepare and have signed, and file the bills of exception herein taken as aforesaid; the said delay of ten days to count and be computed from and after May 29th, 1901, and for general relief.

(Signed) BRANCH T. MILLER,
Att'y for Petitioner.

The additional delay of ten days hereinabove prayed for is hereby granted.

Done and signed at New Orleans, La., on this 29th day of May, A. D. 1901.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Order Overruling Rule for New Trial.

Extract from the Minutes, April Term, 1901.

NEW ORLEANS, FRIDAY, *June* 7, 1901.

Court met pursuant to adjournment:

Present: Hon. Charles Parlange, district judge.

16 HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

This cause came on to be heard at a former day upon the rule for a new trial filed by the plaintiff, and after argument, was submitted.

On consideration thereof and for the reasons assigned in the written opinion on file, it is ordered that the motion for a new trial be overruled.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, April Term, 1901.

NEW ORLEANS, TUESDAY, *May* 14, 1901.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, district judge.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

By reason of the verdict of the jury herein and in accordance therewith:
It is ordered, adjudged and decreed that there be judgment in favor of the defendant, The Texas and Pacific Railroad Company, dismissing this suit with costs.
Judgment rendered May 14, 1901.
Judgment signed June 11, 1901.

(Signed) CHARLES PARLANGE, *Judge.*

17 *Bill of Exceptions No.* 1.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

Bill of exceptions No. 1.

This was an action at law to recover the value of certain cotton, the property of plaintiff, destroyed by fire while in the possession of defendant as a common carrier, said possession being had by said defendant under and by virtue of a certain bill of lading, issued and delivered by defendant to the plaintiff, showing its receipt of said cotton, and its contract as a common carrier, to carry the said cotton from Lecompte station, parish of Rapides, State of Louisiana, a point on the line of railway of defendant, to the city of New Or-

leans, State of Louisiana, and there deliver the said cotton to plaintiff.

The case came regularly on for trial, on the 13th day of May, 1901, before the Honorable Charles Parlange, district judge, sitting in the circuit court; Branch K. Miller, Esq., appearing as counsel for the plaintiff, and Walker B. Spencer, Esq., appearing as counsel for the defendant.

A jury having been empaneled, the following proceedings were had and testimony taken and evidence adduced:

The bill of lading issued and delivered by defendant to plaintiff for the cotton described in plaintiff's petition, was offered and introduced in evidence before the jury by the plaintiff, with the reservation of his right to contest the effect and binding force, as concerned him, the plaintiff, of the clause contained in said bill of lading, undertaking to exempt the defendant from any liability for loss or damage to the said cotton caused by fire; a copy of the said bill of lading is hereto attached and made a part of this bill of exception, and is made part thereof, the same, as though it was fully set out and incorporated at length therein.

Thereupon defendant in open court before the jury, admitted that Rene Drouet, a witness for the plaintiff, then and there by illness, confined to his bed in the city of New Orleans, State of Louisiana,
and for that reason unable to be present in court, would, if
18 present as a witness at the trial hereof, *would* testify as is set
out in the minutes and transcript of the testimony and evidence taken and adduced before the jury on the trial hereof, which is hereto attached as part of this bill of exception and which is to be taken, considered and construed the same as though it were fully set out at length and incorporated herein.

That thereupon the plaintiff produced before the jury and examined as witnesses in his behalf to maintain and prove the issues and contentions upon his part, and to prove the facts necessary to establish the cause of action set out in his petition the following persons, to-wit: F. G. Drouet and Henry Charnock, who each gave testimony as will appear by the stenographic report or transcript of the evidence taken, and proceedings had, upon the trial hereof, which is hereto annexed and made part of this bill of exceptions, to be taken, considered and construed as though set out at length, and incorporated herein.

That thereupon the plaintiff offered and introduced in evidence before the jury, a statement showing the value of the cotton described in plaintiff's petition, which counsel for defendant then and there agreed should be admitted in evidence, which said statement is hereto attached as part of this bill of exceptions, and is to be taken, considered and construed the same as though set out at length, and fully incorporated herein.

That thereupon the defendant to support and maintain the issues on its part, and to prove the facts constituting in part its defense herein, produced and examined as a witness before the jury, J. B. Paul, who gave testimony or evidence, as appears in the said steno-

graphic report or transcript of the evidence offered, introduced and admitted to the jury on the trial hereof, which said transcript or report is made part of this bill of exceptions, is to be taken, considered and construed as though fully set out at length, and fully incorporated therein.

This concluded the testimony and evidence offered and introduced upon the trial by both the plaintiff and defendant; and the foregoing constitutes all, or the whole, of the testimony and evidence in the cause.

Thereupon the plaintiff on May 14, 1901, the trial of the cause having been adjourned to that day, requested the court to direct or instruct the jury upon all of the evidence and testimony heard and admitted in the cause, to find a verdict for him, plaintiff; which said request of plaintiff, then and there made through his counsel,
was refused by the court, to which refusal plaintiff, by his
19 counsel, then and there duly excepted, and hereby tenders this
his bill of exception to the court to sign and seal, and the court does hereby sign and seal the same.

That thereupon the jury rendered and returned a verdict in favor of defendant on the said 13th day of May, 1901.

And now in furtherance of justice, and that right may be done, the court allows the said exceptions and bill of exceptions, and signs and certifies the same.

Done in open court, this 14th day of June, 1901, *nunc pro tunc*, as of May 14th, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE,
U. S. Judge.

(Original.)

Form 119 revised. 9-'95.

The Texas & Pacific Railway Company.

Domestic Cotton Bill of Lading.

Bill of lading No. D 129.
T. & P. contract No. —.
—— R. R. contract No. —.
From ——.
To ——.

(1 cent U. S. documentary rev. stamp.)

Route:

Via So. Pac. Co., Lecompte, La.
L O A Clecf In
T. and P. 6236.
T. and P. 5984.

At Meeker's, La.
Gross weight, pounds, by shipper.
— through rate per 100 lbs. —.
J. Fitzpatrick.
By Drouet.
Total freight $—.
Advanced charges, $—.

Sc. 2464.

Received by Texas & Pacific Railway Company, in apparent good order and well conditioned, of Jas. Fitzpatrick for delivery to Henry Charnock, or their assigns, at New Orleans, La., he or they paying freight and charges as per margin, the following articles, to say: 52 bales of cotton.

20 Number—marks:

C W B 8, C R 6, M W 4, M R 3, J R S 3, A R 3, C H 3, L M 2, Z R 2, J J 2, G H 2, J A M 2, D A 2, J K 2, D Y 2, O S-M 1, C M 1, B B 1, M T 1, G B 1, C A 1.

Upon the following terms and conditions, which are fully assented to *and* the owner, viz:

1. That the liability of the Texas & Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damage to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor for any other damage or injury thereto arising from imperfect baling or pressing; nor for any loss or damage thereto by collision, or any of the other dangers of navigation and perils of sea while on seas, gulfs, lakes, rivers and canals.

4. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the
21 Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

6. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

7. That no suit or action against the Texas & Pacific Railway Company on any claim for damages arising from any breach of this contract, or injury to, or loss or destruction of said cotton, shall be sustained in any court unless notice in writing distinctly setting forth the claim, shall be given to the nearest or any other convenient local agent of the said Texas & Pacific Railway Company before the expiration of ninety days from the date of accrual of such claim; and in no event shall any suit or action in any court, for damages arising from any breach of this contract, or for damages or injury to, or loss or destruction of said cotton, or any part thereof be sustained, unless the same shall be commenced before the expiration of two years from the date when such breach, injury, loss or destruction occurred and the lapse of such time shall be conclusive evidence against the validity of such claim and demand.

8. Each carrier over whose route cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same in accordance with the rules and regulations promulgated by the Texas railroad commission governing the compressing of cotton, and no carrier shall be held responsible for delays in procuring such compression, and shall not be liable for loss or damage to cotton by any cause while in the compress or on side track or platform appurtenant thereto.

9. That the acceptance of the bill of lading shall be deemed
22 conclusive proof of the assent of the owner of said cotton to all the terms and conditions written or printed hereon.

In witness whereof, the agent signing for the railway company

hath affirmed to 3 bills of lading, of this tenor and date, one of which being accomplished the others to stand void.

Dated at Lecompte, La., this 26th day of Dec., 1900.

(Signed) J. H. KIRKPATRICK, *Agent.*

(Stamped on reverse:) B 69096.

Map of the Texas & Pacific R'y and connecting lines printed on reverse.

On reverse: No. 12944. Filed May 13, 1901. (Signed) H. J. Carter, d'y clerk.

Identified with bill of exception No. 1 in Charnock *vs.* T. & P. R. W. Co., No. 12944, U. S. circ. c'rt east. dist. La. (Signed) Chas. P., J.

B 69096.
Sc. 2464.

Texas & Pacific Railway Company to H. Charnock, Dr.

For 51 bales cotton burnt in cars numbered 6237 and 5984 at Meeker's Switch. B/L dated December 26th, 1900.

L M	576	A R	580	JJ	625	J K	560	CWB	515	CR	530
	514		530		550	G B	450		482		
M W	460		730	JAN	605	C A	555		501		
	522	Z R	502	M P	385	D Y	468		533		
	430		554	JRS	564		510		515		
	550	C H	585		500	G H	450	C R	520		
M R	510		416		500		460		515		
	443		375	D A	411	CWB	485		675		
	450	C M	406		456		415		555		
ASM	450	B B	660	J K	440		610		555		
	4905		5338		5036		4963		5366		530

Total 26,138 lbs. @ 9 11/16c..... $2532.12
Less freight $1.80 per bale..... 91.80

$2440.32

E. & O. E.
New Orleans, January 21st, 1901.

H. CHARNOCK.

23 (Indorsed:) No. 12944. Filed May 13, 1901. (S'g'd) H. J. Carter, d'y clerk. Identified with bill of exception No. 1, in Charnock *vs.* T. & P. R. W. Co., No. 12944, U. S. circ. c'rt, east. dist., La. (Signed) Chas. P., J.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

Index.

* * * * * * *

The following testimony and notes of evidence and ruling of the court identified with bill of exception No. 1 and made parts thereof in Charnock *vs.* T. & P. R. W. Co., No. 12944 U. S. circuit court east. dist. La. The reasons of the court for refusing a new trial are also made part of said bill of exception No. 1.

(Signed) CHARLES PARLANGE,
U. S. Judge.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 12944.

NEW ORLEANS, LA., *May 13th*, 1901.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and the following proceedings were had:

Branch K. Miller, Esq., for the plaintiff.

Howe, Spencer & Cocke, Esqrs., for the defendant.

The jury being empaneled and the pleadings read:

Admission.

It is admitted, that Rene Drouet, a witness for the plaintiff now in New Orleans, having come from his home in the parish of Rapides, for the purpose of testifying as a witness in this case,
24 but at present to- ill to appear in court, as appears by the certificate of Dr. Le Burthe, his attending physician, if present here on the trial and examined as a witness, would swear to the following facts: That he was employed by the plaintiff upon his Lurenburg plantation in the parish of Rapides; that on the date set out in the petition, to-wit: December 26th, 1900, the cotton described in the petition was brought by a gang of laborers employed upon said Lurenburg plantation in charge of and under the direction of the witness, from said Lurenburg plantation by a tramway to Meeker's switch, a point on the switch track of the defendant company; that after said cotton was thus brought, or carried to Meeker's switch aforesaid, it was unloaded from said tramway, by

said gang of laborers, under the superintendence and control of the witness; that it was ranged upon the ground, bale, by bale, and from there, by the said gang of laborers, under the direction and control of witness, and was loaded upon two closed or box cars of the defendant company, which were then and there upon its track at said Meeker's switch, having been brought there by defendant for the purpose of receiving said cotton; that after said cotton was thus loaded upon said cars, the doors of the said cars were closed and locked by the witness; that thereupon, the witness proceeded to Lecompte, the nearest station of defendant, from said Meeker's switch, and then and there obtained a bill of lading for the transportation of the said cotton to New Orleans, the bill of lading being the same described in plaintiff's petition; that the loading of said cotton was completed at about 2:30 p. m. on December 26th, 1900, after which the witness went to his dinner; that after dinner he proceeded to Lecompte, as aforesaid, and obtained from the agent of the defendant at said Lecompte, the bill of lading aforesaid, at about 5:20 p. m.

F. G. DROUET, sworn for plaintiff, says:

By Mr. MILLER:

Q. Where do you live?

A. At Meeker, Rapides parish.

Q. That is near the Lurenburg plantation?

A. About two and a half miles from the Lurenburg plantation.

Q. The Lurenburg plantation is the property of Henry Charnock, the plaintiff in this case?

A. It was at the time, but it has changed hands since.

Q. Do you know anything of the circumstances connected with the shipment of fifty-two bales of cotton from Meeker switch to New Orleans, in December last?

A. No sir, I do not know anything about the shipment.

25 Q. It was your brother Rene that attended to that?

A. Yes, sir.

Q. Do you know anything about that cotton after it was received by the Texas & Pacific Railway Co. Anything that happened to it?

A. I know that on December 27th, at about 10 o'clock at night——

Q. Was it December 26th or 27th?

A. It was the same date that the cotton was loaded; I do not recollect the date of the month exactly, but about 10 o'clock that night, before retiring, I stepped out of my room on to the back gallery, and as I stepped out, I noticed the glare of fire about a quarter of a mile away from the house. Then I stepped out off my gallery and went to my weigher, who had been weighing the cotton there, and I noticed the fire out in our field then, and I asked him if he had any fire in the scale house that day, and he said that he had no fire in the scale house. And upon questioning him closely about it, he stepped out on the gallery also, and he said, "I believe it is the two cars of cotton that were standing there, that were loaded to-day by

the Lurenburg plantation by your brother." And immediately we gave the alarm, and ran out and ran out a quarter of a mile, and on reaching there, we found the first car nearest the track on fire and open, from which we got out one bale of cotton, and rolled it towards the scale house. Our attention was then drawn to the empty box car ahead of those two box cars, and we shoved that out to save it; and the last car, when we came to open it, we discovered that to be on fire also, and we done everything that we could, in our power to save it, to put it out; but there was no water, or any appliances and we consequently abandoned it. There was quite a crowd of laborers there then, that had come there after the alarm was given, in season, trying to save the cotton. We stayed there about an hour and a half or a couple of hours, I did not note the time particularly, but after everything was consumed, we retired for the night; and the next morning, we sent word to Lurenburg of the occurrence of the fire of the night before.

Q. What time in the night was your attention first called to the fire?

A. About 10 o'clock.

Q. Have you any knowledge at all of how long the cotton had been loaded in those cars?

A. No sir, I do not know anything about that.

Q. Of your knowledge you know nothing about it?

A. No, sir.

26 Q. And you repaired at once to the switch where those cars were as you stated?

A. Yes, sir.

Q. And you found one car open and the cotton in it on fire?

A. Yes, sir.

Q. And from that car you saved one bale?

A. Yes, sir.

Q. Now the other car, was or not, attached to the car that you found on fire?

A. Yes, sir, coupled up.

Q. The car which you spoke of, that last one, that was coupled up to the one you found on fire; was that open or closed?

A. It was closed.

Q. You say you opened that car?

A. Yes sir, we opened it.

Q. And on opening it, did you find it on fire or not?

A. Yes sir, on fire.

Q. The cotton inside was on fire?

A. Yes sir, as we opened the door, the car broke out all in a blaze.

Q. You found both cars on fire?

A. Yes, sir.

Q. And you used all the efforts you could to save as much cotton as possible?

A. Yes, sir.

Q. You succeeded in saving only one bale?

A. Yes, sir.
Q. How far is Meeker's switch from Lecompte?
A. Two miles and a half.
Q. What is the character of the country there, in regard to tramps and irresponsible people wandering about the country, especially on the railroad tracks?

Mr. Spencer for the defendant objects to the inquiry unless it is first shown the defendant had knowledge of the particular facts inquired about.
The court overrules the objection for the time being, for the reason that the plaintiff cannot possibly make out his whole case at one time, and that after all the evidence on the part of the plaintiff is in, the court will reconsider the matter.
To which ruling, Mr. Spencer reserves exception.

Q. (repeated). What is the character of the country up there in regard to tramps and irresponsible people wandering about the country, and especially on the railroad tracks?
27 A. Well, there is on all railroads a certain amount of tramps that are going from time to time and at all hours of the day and night; but I am not on the railroad at all times to notice them.
Q. You are a resident of that neighborhood?
A. Yes, sir.
Q. How long has that railroad been there?
A. I believe it has been there 10 or 12 years.
Q. They have a station at Lecompte, how long?
A. Ever since the road has been running up there.
Q. There is somebody in charge of that station?
A. Yes, sir, an agent.
Q. And agent has always been there?
A. Yes, sir.
Q. What opportunities did you have of knowing the character of the place as regards tramps and wandering people, which the railroad company and its agent had not?
A. What is that?
Q. Are you in any better position to know the habit of tramps and people wandering about the country—have you had an opportunity of knowing that better than the railroad company itself, through its agent?
A. No sir, I have not.
Q. Is the fact that you have mentioned known to any extent in that vicinity?
A. That is, tramps going up and down?
Q. Yes.
A. Yes, sir, I reckon so; everybody notices them going up and down; that is a daily occurrence.

Cross examined.

By Mr. SPENCER:

Q. I understand, that when you reached the scene, you found a lot of other people there?

A. Yes sir, there were other people came along with me after I gave the alarm.

Q. Did you find anybody there when you got to the cars?

A. We got there about altogether; I was the first one discovered the fire and gave the alarm, and they followed me out there to try and save all we could of the cotton.

Q. Do you know who opened the car door of the first car?

A. No, sir.

Q. Could that have been done by people there trying to save the cotton?

A. No sir, because I was one of the first there trying to save the cotton.

28 Q. You do not know whether it was opened by one of those people, without your knowledge, or not?

A. No, sir.

Q. How many cars were standing on that spur track?

A. There were three box cars.

Q. Which car was on fire?

A. The Texas & Pacific car.

Q. Which car was nearest the railroad track—one of the loaded cars?

A. There was a box car that was nearest the railroad track, then this car and the next one also.

Q. Then I understand the car standing nearest the main track, was an empty car which was open?

A. Yes, sir.

Q. That was on fire?

A. No, sir.

Q. The car next to that?

A. That was on fire.

Q. That car had cotton in it?

A. Yes, sir.

Q. And the third car also contained cotton?

A. Yes, sir.

Q. That was also on fire?

A. Yes, sir.

Q. The fire had progressed to some extent?

A. Yes sir, when we got there first, the first car, was a bale, badly burning on both ends you may say. We got some hooks and saved that bale; that was right at the door of the car; that was the only bale we could save.

Q. How many cars had cotton in them at all?

A. Two cars.

Q. One of the cars which was loaded with cotton, was on fire when you got there?

A. Yes, sir.
Q. Was the third car containing cotton, also on fire?
A. We did not know it was on fire until we opened it.
Q. You did not notice that it had burned at all on the outside?
A. No, sir.
Q. So the fire must have originated from the interior of that car?
A. Yes sir, I think so.
Q. That third car had both doors closed and locked?
A. Yes, sir.

29 Q. Now this Meeker switch is just a spur track running out from the main track of the Texas & Pacific railroad into Meeker's plantation?

A. Yes, sir.
Q. And runs out to where the sugarhouse formerly was?
A. Yes, sir.
Q. How long is that switch, from the main track to the extreme end of it on the plantation?
A. I should say it is a good half a mile from end to end.
Q. How near were those cars to the place where the old sugarhouse stood?
A. It is a good distance, fully ⅝ of a mile from the sugarhouse.
Q. They were standing ⅝ of a mile from where the old sugarhouse used to stand?
A. Yes, sir, nearest the Texas & Pacific railroad.
Q. How far from where the switch joined the track, were those cars standing?
A. Not a great distance; say a couple of lengths of a car, I reckon.
Q. A couple of car lengths?
A. Yes, sir.
Q. You say you know nothing of the loading of this particular shipment?
A. No sir, nothing.
Q. You were asked with reference to loading, and whether you had ever shipped any cotton out there?
A. Yes, sir.
Q. You were employed on the Meeker sugar plantation at one time?
A. Yes, sir, I had charge of the estate.
Q. Did you ship sugar from there?
A. Yes sir, we shipped from that sugarhouse there.
Q. Had it been the custom of the Texas & Pacific railroad to have a watchman down there to watch the cars?
A. No sir, we had our own watchman in our sugarhouse.
Q. That was generally known to all, that the railroad company had no watchman down there?
A. Yes, sir.
Q. There is no station house at Meeker's switch?
A. There is a platform.
Q. An ordinary platform for the loading of goods?

A. Yes, sir, an ordinary platform, with a little building on it to protect the freight from the weather.

Q. But there is no station agent there?

A. No, sir.

Q. There has never been one there?

30 A. No, sir.

Q. The nearest station is Lecompte, two miles and a half, away?

A. Yes, sir.

Q. How far is your house from where those cars were standing?

A. A quarter of a mile.

Q. Was there any house nearer than that?

A. Yes sir, we had a store building nearer to the track than our house is, it is just about half way between the two.

Q. How far was your store building from those cars?

A. About 600 yards.

By the COURT:

Q. Tell me how this cotton is loaded; you say this is simply a flag station—or is it a flag station?

A. Yes sir, it is.

Q. Describe the process. You took the cotton out there, that was the first thing, drawn in a cart?

A. No sir, a tramway.

Q. There, would you find some box cars?

A. Yes, sir.

Q. Would there be any railroad employés there?

A. No, sir.

Q. Nothing but some box cars?

A. Yes, sir.

Q. Who would load the cotton into the box cars?

A. A shipper would.

Q. That would be the first step. The cotton would remain there until, when?

A. Just until they gave orders to the first train to take it out of that switch, which possibly would be that evening, or the next morning; that depends upon what time it was loaded. When billing sugar in our sugarhouse, we had the bill made out by the station agent, telling him so many barrels of sugar there would be, and the agent would make out the bill of lading on the strength of that statement, and it would go out by the first train coming along.

Q. But in the case of this particular shipment, do you know when the bill of lading was given?

A. No sir, I do not know anything about that.

Mr. Miller for the plaintiff offers in evidence a statement showing the value of the cotton destroyed by fire, spoken of by the witness, which statement, it is agreed by counsel for defendant should be admitted in evidence.

31 For the purpose of proving the receipt of the cotton by the defendant company, and that the cotton was in its possession as a common carrier, to be transported by it from Meeker switch to New Orleans, and for no other purpose, Mr. Miller offers in evidence on behalf of the plaintiff a certain bill of lading, issued by the defendant company on the 26th December, 1900, showing the receipt from James Fitzpatrick of the cotton in question, to be carried and delivered by the defendant company, to Henry Charnock, in New Orleans. This offer is without prejudice to and with a full reservation by the defendant company of the right to contest the legality and binding force of the clause contained in the bill of lading, purporting to free the defendant company from any liability for loss or for damage to the cotton in question, by fire.

Mr. Spencer for the defendant objects to any qualification being attached to the offer of the bill of lading in evidence.

The court overruled the objection, and Mr. Spencer here notes an exception.

By Mr. MILLER:

Q. When you reached Meeker's switch and found those two cars on fire, was anybody, agent, employé, or servant of the defendant railroad company present?

A. No, sir.

Q. Or take part in trying to extinguish the fire, or saving the cotton?

A. No, sir.

Q. There was only yourself, and persons from the neighborhood, not connected with the defendant in any way?

A. Yes, sir.

Q. There was nobody else?

A. No, sir.

Q. Does the railroad company maintain a station at Meeker switch?

A. It is a flag station, but they put the mail off there.

Q. Has the railroad an agent there?

A. No, sir.

Q. There is nobody there in charge of it at all?

A. No, sir.

Q. Meeker's switch is what; an open field, or what?

A. It is right there in the open field on our plantation, that comes in from the main line of the Texas & Pacific railroad.

Q. It is not protected, or enclosed in any way, it is just in the open country?

A. Yes, sir.

32 By Mr. SPENCER:

Q. In other words, it is just like any other spur track in the country, running from the main line out to some sugarhouse in a field?

A. Yes, sir.

HENRY CHARNOCK, sworn for the plaintiff, says:

By Mr. MILLER:

Q. You are the plaintiff in this case?
A. Yes sir, I am agent.
Q. Did you carry any insurance on this cotton?
A. None whatever.
Q. Did you have any insurance on it, so far as it was on your Lurenburg plantation?
A. No, sir.
Q. Did you have any insurance on it to protect you, after it got in the possession of the railroad company?
A. No, sir.
Q. You had no insurance at all?
A. None whatever.
Q. I suppose you have not assigned any insurance you have got, to anybody else?
A. No, sir.
Q. You had no insurance to assign?
A. No, sir.
Q. This is the bill of lading for the cotton, received from Mr. Fitzpatrick, who is your manager on that place in your absence?
A. Yes, sir.
Q. He is in your employment?
A. Yes, sir.

Plaintiff closes his case.

J. B. PAUL, sworn for the defendant, says:

By Mr. SPENCER:

Q. You reside in New Orleans?
A. Yes, sir.
Q. What position do you hold with the Texas & Pacific Railroad Co.?
A. I am division superintendent.
Q. How long have you been such superintendent?
A. About eleven years.
33 Q. Are you familiar with the location of Meeker switch?
A. Yes, sir.
Q. You heard the witness Mr. Drouet describe it; is that about the appearance and location of the switch?
A. Yes sir, that is about the location.
Q. State whether or not the Texas & Pacific railroad maintains any station agent or watchman at any of those switch tracks, running into plantations, such as this?
A. No sir, nor at section blind sidings. We maintain no watchman or agents only at regular stations.
Q. Is Meeker switch a regular station of the Texas & Pacific railroad?
A. No, sir.

Q. Is the rule of the Texas & Pacific railroad of long standing and universal application?

A. Yes, sir.

By the COURT:

Q. Tell me what the process is. Suppose I was on Meeker plantation, and wanted to send down two carloads of cotton. Now, of course, these cars would not be there at the time; so how would I go about it. If I wanted to ship cotton, just tell me what I would do?

A. You would order your cars from the nearest agent; in that case, the cars coming east, the nearest agent would be Lecompte—it did not matter which agent you ordered them from; but he would order the cars for you and bill the freight, after it was loaded.

Q. Then I would simply notify him that I wanted two or three cars?

A. Yes, sir.

Q. Then as soon as he can, he will hand them over to me?

A. Yes sir, and then you load them.

Q. Then how do I get my bill of lading?

A. You get it through the agent that orders the cars for you.

Q. The nearest agent?

A. Yes, sir.

Q. Then the first train that comes along, takes those cars and goes off with them?

A. Yes sir, they are taken off very promptly.

Q. How long do they stay there?

A. Sometimes four or five hours; sometimes ten or fifteen minutes; it depends upon how soon the train comes.

Q. You said four or five hours. Is that the longest time they stay there?

34 A. No sir, they some times stay longer; but they are very prompt about taking them up, by the local train.

Q. That is what I want to know; what is the longest time they would be liable to stay there, as a general thing?

A. Well, I should say six or eight hours would be a good average.

By Mr. SPENCER:

Q. What train of the Texas & Pacific railroad removes the cars from those spur tracks, sugarhouse spur tracks, and tracks of that kind and brings them to New Orleans?

A. The local train; known as Nos. 69 and 70, known as the local train.

Q. Do you know whether or not either of those trains passed there between 5 o'clock that evening, and 10 o'clock, when the cotton was burned, on that date?

A. Well, they should both have passed before that time.

Q. Before what time?

A. Before 10 o'clock in the evening.

Q. Do you know at what time that train No. 70 would be due at Lecompte, state from your time sheet?

A. From the time card, No. 70 is due there about 9 o'clock in the morning.

Q. And this was in the afternoon?

A. Yes, sir.

Q. So that the train did not come there between 5 o'clock in the evening, and 10 o'clock that same night?

A. No sir, at 9 o'clock, a. m., it does.

Q. 9 o'clock in the morning would be the first local train to pass coming to New Orleans?

A. Yes, sir; the first local train.

And the evidence being all closed, Mr. Spencer for the defendant moves the court to direct a verdict in favor of the defendant.

And Mr. Miller for the plaintiff moves the court to direct the jury to return a verdict for the plaintiff on the evidence submitted.

Adjourned.

NEW ORLEANS, LA., *May 14th*, 1901.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and all of counsel of record, present.

On the respective motions made by counsel for the court to direct a verdict in favor of the plaintiff and defendant, the court now ruled as follows:

35 Both the plaintiff and the defendant have moved the court to direct the verdict. As to the condition of things thus created and the effect of such cross motions, see Mr. Justice White, as the organ of the court, in Beuttell *vs.* Magone, 157 U. S., page 157.

I am perfectly clear that the stipulation in the bill of lading exempting the carrier from loss by fire is valid. See Woods on Railroads, vol. 3, sec. 425. Hutchinson on Carriers, 2nd ed'n, sec. 278. Am. and Eng. Enc. Law, 2nd ed'n, *verbis* "Carriers of goods," vol. 5, page 288, *et seq.*, specially page 293. 72 N. Y., p. 90. Of course, the carrier could not have provided against his own negligence, or that of his servants, and that point is not involved in this case.

I am equally clear that the burden of proving that the loss of the cotton was caused by the negligence of the carrier, is upon the plaintiff. See the Reeves' case, 10 Wall., p. 189; and the Downer case, 11 Wall., p. 129, leading cases of the highest authority which have laid down the rule invariably followed by the Federal courts.

The plaintiff relies on the case of V. and A. Meyer & Co. *vs.* R. R., 41 La. An., p. 639. But that case was decided solely on a point entirely different from any issue in this cause. In that case the court pointedly said, (at page 642): "The liability of the company to the plaintiffs in the present case rests solely on their failure to ship at the proper time.

The defendant cites the case of R. R. *vs.* Wood, by the supreme court of Alabama, 66 Ala. Rep. page 167; also reported in 9 An.

and Eng. R. R. Cases, page 419. This was an action for loss of freight put out by the carrier at a flag station where the carrier had no agent or other servant, the goods being stolen after they had been put off and left by the carrier. In that case the court said: "When the consignee was informed that there was no agent of the company there (at the flag station) he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied condition. (Wells *vs.* R. R., 6 Jones (n, c,) 47." This reasoning applies with great force to the present cause.

It is shown without dispute that Meeker station is a flag station. That a person wanting box cars there applies to the nearest station, at Lecompte, about 2½ miles from Meeker. That the cars are then sent to the side or switch track, at Meeker. That the shipper loads them and then goes to the agent and obtains his bill of lading, whereupon the next train passing the flag station takes the
36 cars. The shipper well knows that the carrier has no guard or watchman at Meeker and does not expect that the carrier will guard the freight at Meeker. All of this is plainly shown by the plaintiff's own evidence, and there is no dispute whatever concerning it.

The loading of the box cars with cotton was completed about 2 p. m. The bill of lading was obtained about 5 p. m. and the cotton was discovered to be on fire about 10 p. m. The train which was to take the cars was not due till about 9 a. m. the next morning. After loading the cars the servants of plaintiff abandoned the loaded box cars.

At the argument of the motion to direct a verdict the only case relied upon or cited on behalf of plaintiff was Meyer & Co. *vs.* R. R., *supra*, since then, Fisher *vs.* Brignoval, 8 N. S. (La.) 120, and other cases have been cited for plaintiff. None of them, in my opinion, present the conditions of the cause at bar.

This is not a case where a shipper expects care and custody of his goods by the carrier. On the contrary, it is a case where he well knows that the carrier will not guard the goods, and the shipper accepting this situation, without protest, and failing himself to guard the goods, it would seem that either on the ground of assent, or the ground of having assisted in bringing about the loss, or for both of these reasons, the shipper could not recover. It is testified that there were tramps and other passersby at Meeker, such as there are on all railroads, but this evidence comes from the plaintiff's witness and as he knew of this danger—if it was a danger—the inquiry naturally arises whether the plaintiff having voluntarily submitted his goods to a danger well known to him, can recover under the circumstances of this case. Another consideration might be, whether it was not entirely unnecessary to allow the cotton to remain unprotected at the flag station from 2 p. m. to 9 a. m. the next day. It may well be that the cotton could have been loaded the next day prior to 9 a. m.

The defendant's counsel argues with great force that even if it be

held that the carrier was at fault, there is absolutely no proof that the neglect alleged was the cause of the fire. Of course, it would not be sufficient for plaintiff to show negligence in this cause, but it would be essential for him also to show the relation of cause and effect between the negligence and the loss.

The only negligence claimed by plaintiff is the failure of the carrier to have a guard at Meeker. Of course, it is not claimed that it was the duty of the carrier to have on hand at Meeker, apparatus or other means for the extinguishment of fires. Defendant's
37 counsel argues that there is no proof whatever, that even if the carrier had had a guard or guards at Meeker, the fire would not have happened. And this contention seems to have great force. On careful consideration of the whole case, I am clearly of opinion that a verdict must be directed in favor of the defendant company.

Mr. Miller, for the plaintiff, now asks the court that the matter of negligence of the defendant company be submitted to the jury.

The court refused to (grant) the motion of Mr. Miller. To which refusal Mr. Miller reserves exception.

Mr. Miller also reserves exception to the instruction of the court to the jury to return a verdict for the defendant. Also he reserves exception to the court refusing his motion to direct a verdict for the plaintiff. And all evidence now submitted to the jury on the trial be made a part of the bill of exception.

Opinion of the Court Refusing Motion for New Trial.

Filed June 7, 1901, Made Part of Bill of Exceptions No. 1.

U. S. Circuit Court, Eastern District La.

H'y Charnock
vs.
T. and P. } No. 12944.

Opinion of court refusing motion for new trial.

Parlange, *District Judge:*

The whole argument on the motion for a new trial seemed to turn on the question whether or not the burden of proving negligence as also a casual connection between the negligence and the damage, was on the plaintiff. I am clear that the burden of such proof was on the plaintiff. In the first place, there was no proof, in my opinion, of any negligence under the particular facts of this case. Then, even if it were held that there was proof from which the jury could have found negligence, it is very clear that there was absolutely no proof that the negligence (which of course could only be the failure of the railroad company to guard the cotton) was the cause of
38 the fire. Counsel for the defendant company suggested in argument several conditions of things under which the fire

could have taken place even if the defendant company had had a guard to watch over the cotton. Of course, the jury could not have been permitted to reach a conclusion by guessing.

See the following authorities:

R. R. *vs.* Reeves, 10 Wall. 189.
Transportation Co. *vs.* Downer, 11 Wall., p. 129.
Clark, *et al.*, *vs.* Barnwell *et al.*, 12 How. 272.
Rich, *et al.*, *vs.* Lambert, *et al.*, 12 How. 347.
Christie *vs.* The Creighton, 41 F. R. 62.
Pacific Coast S. S. Co. *vs.* Bancroft-Whitney Co., *et al.*, C. C. A. 94th F. R. 181.
Crowell *vs.* Union Oil Co., C. C. A. 107 F. R. 302.
Hutchinson on Carriers, 2nd ed'n, secs. 764 and 767—
Platt *vs.* Richmond, &c., R. R., 108 N. Y. 358.
Germania Fire Ins. Co. *vs.* M. & C. R. R. Co., 72 New York, p. 90.
Wood on Railroads, vol. 3, page 1886. (Minor's ed'n, of 1894.)
Sec. 129, U. S. 443.

As to burden of proof in Louisiana:

2 Robinson, 402.
17 Annual, 9.
24 Annual, 101—

As to the difference between the origin of a fire which consumes a thing and the cause of the loss of the thing, see 71 Fed. Rep., 485. Thomas *vs.* Lancaster.

In a suit for a negligent injury, it is not sufficient to show that the negligence and the injury co-existed, but is must be shown that the negligence caused the injury. *Post hoc ergo propter hoc*, is not sound logic. Justice Campbell in Illinois Central R. R. *vs.* Cathy (Miss. case) 12 South. Rep., p. 253. Also C. C. A. 71 F. R. 484 and 485. There are very numerous texts and authorities on this point.

The motion for a new trial must be overruled.

CHS. P., *J.*

Bill of Exceptions No. 2.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

39 HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

Bill of exceptions No. 2.

Be it remembered, that on the 13th day of May, 1901, the above entitled and numbered cause came on for trial before the above court and a jury duly empaneled, all as is set forth and described

in bill of exceptions No. 1 herein taken in this cause, which is specially referred to so far as may be necessary as part of this bill.

That in the course of said trial, after there had been offered and introduced and submitted to the jury all of the testimony and evidence, which is set out and described in the said bill of exceptions No. 1, and after all testimony and evidence for both plaintiff and defendant introduced and offered, to and before said jury, had been concluded; the said evidence and testimony set out and referred to in said bill of exceptions No. 1, constituting all the testimony and all the evidence introduced and offered upon the trial of said cause, plaintiff, through his counsel, requested the court to direct or instruct the jury to find a verdict for plaintiff, which request was refused by the court, and plaintiff, by his counsel, then and there excepted to the said refusal by the court, as is shown by bill of exceptions No. 1.

Thereupon plaintiff, through his counsel, requested the court to submit to the jury and allow the jury to pass upon and decide the question whether or not the loss or destruction of plaintiff's cotton by fire, as described in plaintiff's petition, was due to or caused by the negligence of the defendant; which said request, for such direction or instruction, was then and there refused by the court, to which action and refusal of the court plaintiff then and there, by his counsel, duly excepted, which exception was then and there allowed, and plaintiff now hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal same.

And now in furtherance of justice and that right may be done, the court allows the said exceptions and bill of exceptions and signs and certifies the same.

Done in open court, this 15th day of June, 1901, *nunc pro tunc* as of May 14th, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

40 *Bill of Exceptions No. 3.*

Filed June 15th, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

Bill of exceptions No. 3.

Be it remembered, that on the 13th day of May, 1901, the above entitled and numbered cause came on for trial before the above court and a jury duly empaneled, all as is set forth and described in

bill of exceptions No. 1, herein taken in this cause, which is specially referred to so far as may be necessary as part of this bill.

That in the course of said trial, after there had been offered and introduced and submitted to the jury all of the testimony and evidence, which is set out and described in the said bill of exceptions No. 1, and after all testimony and evidence for both plaintiff and defendant introduced and offered, to and before said jury, had been concluded; the said evidence and testimony set out and referred to in said bill of exceptions No. 1, constituting all the testimony and all the evidence introduced and offered upon the trial of said cause, plaintiff through his counsel, requested the court to direct or instruct the jury to find a verdict for plaintiff, which request was refused by the court, and plaintiff, by his counsel then and there excepted to the said refusal by the court, as is shown by bill of exceptions No. 1.

Thereupon plaintiff, through his counsel, requested the court to submit to the jury and allow the jury to pass upon and decide the question whether or not the loss or destruction of plaintiff's cotton by fire, as described in plaintiff's petition, was due to or caused by the negligence of the defendant; which said request, for such direction or instruction, was then and there refused by the court, to which action and refusal of the court plaintiff then and there, by his counsel, duly excepted; as is shown by bill of exceptions No. 2 herein; thereupon, defendant, through his counsel, requested the court upon the whole of the testimony and evidence offered and introduced before the jury by both plaintiff and defendant, which is set forth and referred to in and by bill of exceptions No. 1, and the papers and documents thereto annexed, the same constituting
41 the whole of the testimony and evidence which was introduced and placed before the jury on the trial hereof, to instruct the jury to find a verdict for defendant, which request was granted by the court, and accordingly the jury was directed or instructed by the court to find a verdict for defendant; to which said ruling of the court plaintiff, by his counsel, then and there excepted, and said exception was allowed in open court.

And plaintiff now tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.

And now in furtherance of justice and that right may be done, the court allows the said exceptions and bill of exceptions and signs and certifies the same.

Done in open court this 15th day of June, 1901, *nunc pro tunc* as of May 14th, 1901, and I certify that this bill was duly and seasonably presented to me for signature.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Motion for Writ of Error.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

And now comes the plaintiff, Henry Charnock, by Branch K. Miller, his attorney, in the above entitled and numbered cause, and on suggesting to the court that said plaintiff conceives and believes himself to be aggrieved by, and that there is error to his prejudice in the final judgment of this court herein rendered on May 13th, 1901, and that plaintiff desires to remove or carry the said final judgment by writ of error to the United States circuit court of appeals for the fifth circuit to the end that the said final judgment may, by said circuit court of appeals, be examined and reviewed, to the end that the errors in said final judgment contained may be corrected.

It is ordered in open court that the plaintiff, Henry Charnock, be allowed a writ of error, to have reviewed in and by the United States circuit court of appeals for the fifth circuit the final judgment entered in this cause, and that the amount of bond on said writ
42 of error be, and is, hereby fixed at two hundred and fifty dollars.

It is further ordered that the said writ of error be returned to the said United States circuit court of appeals for the fifth circuit, within thirty days from the granting of this motion.

New Orleans, La., June 15, 1901.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Assignment of Errors.

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

Assignment of errors.

And now on this 14th day of June, 1901, comes the plaintiff, Henry Charnock, by Branch K. Miller, his attorney, and in connec-

tion with his motion for a writ of error herein, he assigns as errors in the final judgment in this cause the following, to-wit:

First. That the court erred in refusing the request of plaintiff for a direction or instruction to the jury to find upon the whole of the evidence offered by both the plaintiff and defendant, and submitted to the jury, a verdict for plaintiff; that in refusing to give such direction or instruction to the jury, the court was in error.

Second. That the court erred in withdrawing the cause from the consideration of the jury and directing it, the jury, to find a verdict for defendant; that upon the whole of the evidence offered and submitted to the jury by both the plaintiff and defendant, the said instruction or direction of the court to the jury was not justified, and was in error.

Third. That the court erred in refusing to allow the submission to the jury of the question, whether or not, upon the whole of the evidence offered before and submitted to the jury by both the plaintiff and defendant, the destruction of plaintiff's cotton described in the petition, was due to or caused by, the negligence of the defendant.

43 Fourth. That upon the whole of the evidence offered by both plaintiff and defendant and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff, described in the petition, was due to and caused by the negligence of the defendant, from liability for which the law does not permit the defendant to stipulate that it shall be exempt; that neither the law nor public policy permits, or will permit, the defendant to stipulate for its non-liability for damage or loss caused by its negligence; that from the whole of the evidence, offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which the verdict herein is founded, it clearly appeared that the loss and destruction by fire of plaintiff's cotton, described in the petition, was due to and caused by, solely, the negligence of the defendant; and that it was liable for the loss and destruction of plaintiff's said cotton, the stipulation in the bill of lading herein, exempting the defendant from any liability for loss of or damage to said cotton by fire, to the contrary notwithstanding; and the circuit court in not so holding, and in not so directing and instructing the jury, committed manifest and grievous error to the prejudice of plaintiff.

And the said court committed grievous and manifest error in directing and instructing the jury as aforesaid, upon the whole of the evidence offered by both plaintiff and defendant, this constituting all of the evidence before the jury, to find a verdict for the defendant.

Wherefore, plaintiff, in the circuit court, and plaintiff in error, upon the writ of error prayed for and allowed in this cause, prays that the judgment of the circuit court herein be reversed, and that such direction be given that full force and efficacy *and* enure — the plaintiff by reason of the cause of action stated in his petition, and

the evidence offered and submitted to the jury upon the trial of this cause, in the said circuit court, and for general relief.

(Signed) BRANCH K. MILLER,
Att'y for Plaintiff.

44 *Bond.*

Filed June 15, 1901.

United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

Know all men by these presents, that we, Henry Charnock, as principal, and Robert R. Ellis, as surety, are held and firmly bound unto the Texas & Pacific Railway Company in the full and just sum of two hundred and fifty dollars to be paid to the said Texas & Pacific Railway Company, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the United States circuit court, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said court, between the said Henry Charnock as plaintiff, and the said Texas & Pacific Railway Company, as defendant, a judgment was rendered against the said Henry Charnock and the said Henry Charnock having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company, citing and admonishing it to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Henry Charnock shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) H. CHARNOCK. [SEAL.]
(Signed) ROBERT RICHARDSON ELLIS. [SEAL.]

Approved by:
(Signed) CHARLES PARLANGE, *U. S. Judge.*

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Henry Charnock, plaintiff, and The Texas & Pacific Railway Company, defendant, in the suit No. 12944 of the docket of said court, a manifest error hath happened, to the great damage of the said Henry Charnock, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, *and* the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15 day of June, in the year of our Lord one thousand nine hundred and one.

[SEAL.] E. R. HUNT,
Clerk of the U. S. Circuit Court, Eastern District of Louisiana.

Allowed by:

CHARLES PARLANGE, *U. S. Judge.*

(Indorsed:) No. 12944. Henry Charnock *vs.* Texas & Pacific Railway Company. Writ of error. No. – –. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed 15 June, 1901. E. R. Hunt, clerk.

46 United States Circuit Court, Eastern District of Louisiana.

HENRY CHARNOCK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 12944.

NEW ORLEANS, LA., *May 14th*, 1901.

Reasons of the court for directing the verdict. Parlange, J.

Filed June 10, 1901, as of date May 14, 1901, *nunc pro tunc.*

Note.

Copied heretofore into the foregoing transcript of record at page 37, *et seq.*, thereof as found embodied in the stenographic report of the trial, made part of bill of exceptions No. 1 of the foregoing transcript of record.

(*Clerk's Certificate.*)

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 52 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Henry Charnock *versus* Texas and Pacific Railway Company, No. 12944 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12th day of July, A. D. 1901.

[SEAL.]

E. R. HUNT, *Clerk*,
By H. J. CARTER,
Deputy Clerk.

47 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

DECEMBER 16, 1901.

(Extract from Minutes.)

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1082.

This cause was regularly called this day and submitted to the court after argument by Mr. B. K. Miller, for plaintiff in error, and by Mr. W. B. Spencer, for defendant in error.

November Term, 1901.

JANUARY 7, 1902.

(Extract from Minutes.)

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1082.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, Henry Charnock, and the surety on the writ of error bond herein Rob't R. Ellis, be condemned *in solido*, to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

Jan. 7, 1902.

48 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

HENRY CHARNOCK, Plaintiff in Error,
versus
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1082.

Petition for Rehearing.

Now comes Henry Charnock, plaintiff in error, by his attorney Branch K. Miller, and petitions this honorable court for a rehearing in the above entitled cause for the following reasons and upon the grounds following, to-wit:

First. That the court erred in holding that the contract, or clause in the bill of lading, in question herein exempting the defendant carrier from any liability for loss or damage by fire to the cotton received by it, was binding upon the plaintiff in error; such a contract or clause does not bind the shipper unless, it is just and reasonable, that the burden of showing that said contract or clause was just and reasonable was upon the defendant in error; that said burden of proof was not discharged by defendant in error; that no attempt was made by it to prove that said contract

U. S. circuit court of appeals, Filed Jan. 27 1902 Charles H. Lednum, clerk.

49 or clause was just and reasonable; that no evidence was offered, nor any showing made, by defendant in error to establish that plaintiff in error at the time of the shipment of the cotton and the receipt of the bill of lading was offered or given any opportunity to choose whether or not he would ship his cotton under the common law liability of the defendant in error as a carrier, or its restricted liability as attempted by said contract or clause in its bill of lading, attempting to exempt it from loss or damage to plaintiff in error's cotton, caused by fire; that it does not appear, nor is it in fact, that plaintiff in error was allowed any alternative or choice between the two kinds of contract of carriage which he could make, one under which the defendant in error would be liable to him as a carrier as at common law, and one under which the defendant in error's common law liability would be modified, diminished or lessened as attempted by said clause of said bill of lading.

Second. That before said contract clause in said bill of lading would be held as binding upon plaintiff in error, it was a necessary pre-requisite for defendant in error to show that there was a consideration sufficient to support the said exemption contract, or clause in said bill of lading; that the said clause in said bill of lading attempted to exempt defendant in error from liability for any loss or damage to said cotton by fire, did not and can not bind plaintiff in error until the same was proven or shown by defendant in error to be just and reasonable.

Third. That said exemption clause did not and can not bind plaintiff in error in the absence of a clear showing, that plaintiff in error was allowed a genuine option or choice of the alternative of shipping his cotton at the risk of defendant in error, under the common law, liability or under its restricted liability as attempted by said contract or clause in said bill of lading.

Fourth. That from the facts disclosed by the record, it was a just and reasonable conclusion of law, that the loss or destruction of plaintiff in error's cotton by fire was due to the negligence of defendant in error, by reason of which it lost, or was deprived of the benefit which it might otherwise have had, by reason of said clause
50 in said bill of lading exempting it from liability for any loss or damage to said cotton caused by fire.

That in the conditions disclosed by the record, defendant in error carried the burden of proof, of showing that the loss or destruction of the said cotton by fire, was not due to, or caused by its negligence; that this burden of proof defendant in error failed to discharge, and by reason whereof, the court erred in holding that defendant in error was not liable herein.

Wherefore, petitioner prays that the judgment of the court herein be vacated and set aside, and that a rehearing be granted herein, and for general relief.

BRANCH K. MILLER,
Att'y for Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition is well founded in point of law.

BRANCH K. MILLER.

51 November Term, 1901.

FEBRUARY 11, 1902.

(Extract from Minutes.)

HENRY CHARNOCK
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1082.

Ordered, that the petition for re-hearing filed in this cause be, and the same is hereby denied.

52 U. S. circuit court of appeals, Filed Jan. 7 1902 Charles H. Lednum, clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

HENRY CHARNOCK, Plaintiff in Error,
v.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1082.

Error to the circuit court of the United States for the eastern district of Louisiana.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: This was an action very similar to that of Jovite Cau against the same defendant, just decided. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause, identical in terms with that given in the Cau case. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for ten or eleven years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its character and the other conditions at the time of handling, but no agent or employé
53 of the company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long-established practice was for shippers who had produce to be transported from that point to notify the nearest station-agent of the fact and of the number of cars desired, when

the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading. We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier nor as to the loss falling within the terms of the fire exemption clause. If there was negligence upon the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not, in our opinion, tend to show such negligence. This case falls clearly within the authority of Clark, *et al. v.* Barnwell, *et al.*, 53 U. S. 272; Transportation Company *v.* Downer; 78 U. S. 129; York Company *v.* Central Railroad, 70 U. S. 107.

The judgment of the circuit court is affirmed.

54 In the United States Circuit Court of Appeals for the Fifth Circuit.

HENRY CHARNOCK, Plaintiff in Error,
vs.
TEXAS & PACIFIC RAILWAY CO., Defendant in Error. } No. 1082.

Petition for Writ of Error.

And now comes Henry Charnock, plaintiff in the original suit herein in the circuit court, and plaintiff in error in this court, and plaintiff in error, also, on the writ of error herein prayed for, and says,

That on January 7th, 1901, this court entered a judgment herein in favor of the defendant, The Texas & Pacific Railway Company, a corporation created by, and organized under the acts of Congress of the United States, defendant in the original suit in the circuit court, and defendant in error in this court, and against plaintiff, Henry Charnock, in the circuit court, and plaintiff in error in this court, in which judgment of the circuit court of appeals and the proceedings had prior thereunto, in this cause, certain errors were committed to the prejudice of this plaintiff in error, Henry Charnock, all as aforesaid, all of which will more fully and in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff, Henry Charnock, of the said original suit in the circuit court, and plaintiff in error in this court, prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the fifth circuit, for the correction of errors so complained of, and a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

55 Wherefore, this petitioner prays that a writ of error may be issued in this behalf from the Supreme Court of the United States to the United States circuit court of appeals, for the fifth circuit.

BRANCH K. MILLER,
Attorney for Henry Charnock, Plaintiff in Error.

Order.

And now, to wit: on January 6th, 1903, it is ordered that a writ of error be allowed as prayed for on the within and foregoing petition therefor of Henry Charnock, plaintiff in error, and according to law.

DON A. PARDEE,
Circuit Judge.

The foregoing has the following endorsements, to wit:
No. 1082. In the United States circuit court of appeals fifth circuit. Henry Charnock *v.* Texas & Pacific Railway Co. Petition for writ of error and order of allowance. U. S. circuit court of appeals. Filed Jan. 6 1903. Charles H. Lednum, clerk.

56 In the United States Circuit Court of Appeals for the Fifth Circuit.

HENRY CHARNOCK, Plaintiff in Error,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 1082.

Assignment of Errors.

The plaintiff in this suit, and plaintiff in error, on the writ of error to the final judgment of the circuit court of appeals for the fifth circuit, with his petition for said writ of error, in connection therewith, and filed therewith, makes the following assignment of errors, which he avers occurred in the trial and at the hearing of said cause in said circuit court of appeals:

1. That the said circuit court of appeals erred in affirming the action of the circuit court herein in approving and affirming upon the whole of the evidence introduced by both plaintiff and defendant in said cause, the verdict in favor of the latter; and finding that the said circuit court committed no error in withdrawing the consideration of the evidence in the said cause from the jury by which it was tried, and directing the same to return a verdict in favor of the defendant, and against the plaintiff in the said cause.

2. That the said circuit court of appeals erred, in affirming or approving the action of the said circuit court, in its refusal to allow

the plaintiff in said cause to submit to, and argue before, said jury, the question of the negligence of defendant in said cause, by reason of which, the plaintiff therein claimed the destruction of his cotton was due.

3. That said circuit court of appeals committed error in its concurrence with the trial judge of said cause, in holding
57 that the evidence found in the record, did not show negligence on the part of defendant carrier; that the court should have held the contrary, and have reversed the judgment of the circuit court brought before it for review, on the ground that said negligence of the said defendant was amply sustained by the evidence introduced in said circuit court to prove the same.

4. That the said circuit court of appeals committed error in not sustaining, and, on the grounds therein set forth, reversing the judgment of the said circuit court, the assignment of errors, filed in said circuit court, in connection with the motion for a writ of error therein, and upon which the said circuit court of appeals was asked to reverse the judgment of the said circuit court, as follows, to-wit:

First. That the court erred in refusing the request of plaintiff for a direction or instruction to the jury, to find upon the whole of the evidence offered by both plaintiff and defendant, and submitted to the jury, a verdict for plaintiff; that in refusing to give such direction or instruction to the jury, the court was in error.

Second. That the court erred in withdrawing the cause from the consideration of the jury and directing it, the jury, to find a verdict for defendant; that upon the whole of the evidence offered and submitted to the jury by both the plaintiff and defendant, the said instruction or direction of the court to the jury was not justified, and was in error.

Third. That the court erred in refusing to allow the submission to the jury of the question whether or not, upon the whole of the evidence offered before and submitted to the jury by both plaintiff and defendant, the destruction of plaintiff's cotton described in the petition, was due to or caused by, the negligence of the defendant.

Fourth. That upon the whole of the evidence offered by
58 both plaintiff and defendant and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff, described in the petition, was due to and caused by the negligence of the defendant, from liability for which the law does not permit the defendant to stipulate that it shall be exempt; that neither the law nor public policy permits, or will permit, the defendant to stipulate for its non-liability for damage or loss caused by its negligence; that from the whole of the evidence offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which the verdict herein is founded, it clearly appeared that the loss and destruction by fire, of plaintiff's cotton, described in the petition, was due to and caused by, solely, the negligence of the defendant; and that it was liable for the loss and destruction of plaintiff's said cotton, the stipulation in the bill of lading herein, exempting the defendant from any liability for loss of or

damage to the said cotton by fire, to the contrary notwithstanding; and that the circuit court in not so holding, and in not so directing and instructing the jury, committed manifest and grievous error to the prejudice of plaintiff.

Wherefore, plaintiff in the circuit court, and plaintiff in error, upon the writ of error prayed for and allowed in this cause, prays that the final judgment of the circuit court of appeals, for the fifth circuit, herein be reversed, and that such direction be given that full force and efficacy *and* enure — the plaintiff by reason of the cause of action stated in his petition, and the evidence offered and submitted to the jury upon the trial of this cause, in the said circuit court; and for general relief.

BRANCH K. MILLER,
Attorney for Henry Charnock, Plaintiff in Error.

The foregoing has the following endorsements, to-wit:

No. 1082. In the United States circuit court of appeals, fifth circuit. Henry Charnock *v.* Texas & Pacific Railway Company. Assignment of errors. U. S. circuit court of appeals, Filed Jan. 6 1903 Charles H. Lednum, clerk.

59 Know all men by these presents, that we Henry Charnock as principal and —— —— as sureties are held and firmly bound unto the Texas & Pacific Railway Company in the full and just sum of five hundred dollars, to be paid to the said Texas & Pacific Railway Company, its certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 5th day of January in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a session of the United States circuit court of appeals for the fifth circuit, at New Orleans, La., in a suit depending in said court, between Henry Charnock as plaintiff in error, and said Texas & Pacific Railway Company as defendant in error a — was rendered against the said Henry Charnock plaintiff in error, and the said Henry Charnock, plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court of appeals to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company citing and admonishing it to be and appear at a United States Supreme Court, to be holden at Washington, District of Columbia, in not exceeding thirty days from 5th day of January, 1903.

Now, the condition of the above obligation is such, that if the said Henry Charnock shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

H. CHARNOCK. [SEAL.]
W. S. PARKERSON. [SEAL.]

Sealed and delivered in presence of:
B. K. MILLER.

Approved:
DON A. PARDEE,
United States Circuit Judge.

60 Personally appeared William S. Parkerson who being duly sworn deposes & says, that he is the surety on the bond on the reverse hereof, that he has personally signed the same, and that he is fully worth the sum of five hundred dollars, the amount of said bond over and above all his obligations.

W. S. PARKERSON.

Sworn to and subscribed before me on this the 6th day of January, 1903.

[SEAL.] J. C. HENRIQUES,
Notary Public.

The foregoing has the following endorsements, to-wit:
No. 1082. Henry Charnock *vs.* Texas & Pacific Railway Co. Bond on writ of error. Filed 6 day of Jan'y, 1903. Charles H. Lednum, clerk.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Texas & Pacific Railway Company and Walker B. Spencer and Howe, Spencer & Cocke, attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to an order of appeal filed in the clerk's office of the court of appeals of the United States for the fifth circuit, wherein Henry Charnock is plaintiff in error and The Texas & Pacific Railway Company is defendant in error to show cause, if any there be, why the decree in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of January A. D. 1903 and of the Independence of the United States the — year.

DON A. PARDEE,
United States Circuit Judge.

Service of above citation is hereby accepted
N. O. January 6, 1903.

HOWE, SPENCER & COCKE,
Att'ys for T. & P. R'y Co.

62 [Endorsed:] Original No. 1082 Henry Charnock vs. Texas & Pacific Railway Co. Citation. Filed 6 day of Jan'y A. D. 1903. Charles H. Lednum clerk. By —— —— deputy. Received by U. S. marshal, New Orleans, La. Jan. 8, '03

On this 9th day of January, 1903, before the undersigned authority personally appeared T. I. Galbrith, deputy United States marshal for the eastern district of Louisiana, (known to me as such) who being duly sworn deposes and says that on the 9th day of January, 1903 the affiant served this writ on the Texas and Pacific Railway Company, and Walter B. Spencer, and Howe, Spencer and Cocke attorneys of and for said railway company by handing same to Hon. W. W. Howe, a member of the firm of Howe, Spencer and Cocke, in person, in the city of New Orleans, Louisiana.

T. I. GALBRITH,
Deputy U. S. Marshal.

Sworn to and subscribed before me on this 9th day of January, 1903.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

63 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals of the United States for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals for the fifth circuit, before you, or some of you, between Henry Charnock, plaintiff in error, and The Texas & Pacific Railway Company defendant in error a manifest error hath happened, to the great damage of the said Henry Charnock plaintiff in error, as by his complaint appears. We being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, in not exceeding thirty days from 6th day of January 1903 being the date of issuance of the citation herein, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the Circuit Court of Appeals of the United States for the Fifth Circuit.

Allowed by
DON A. PARDEE,
United States Circuit Judge.

Service of the above writ of error is accepted.
HOWE, SPENCER & COCKE,
Att'ys T. & P. R'y Co.

N. O. January 6, 1903.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 6 day of Jan'y 1903.

CHARLES H. LEDNUM, *Clerk.*

[Endorsed:] No. 1082. Henry Charnock *vs.* Texas & Pacific Railway Co. Writ of error. Filed 6 day of Jan'y A. D. 1903. Charles H. Lednum, clerk.

64 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 64 pages, numbered from A to 63, inclusive, contain and are a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings, in the case of Henry Charnock, plaintiff in error *versus* The Texas & Pacific Railway Company, defendant in error, No. 1182, except, that the original writ of error and citation, instead of copies are attached and included therein, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 9th day of January, A. D. 1903.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18,789. U. S. circuit court of appeals, fifth circuit. Term No. 194. Henry Charnock, plaintiff in error, *vs.* The Texas and Pacific Railway Company. Filed January 19, 1903.

FILE COPY.

1834

Office Supreme Court U. S.
FILED
MAR 15 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

BRANCH K. MILLER,
WILLIAM S. PARKERSON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10038

18343

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK, PLAINTIFF IN ERROR,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a suit for $2,440.32, with interest, the value of 52 bales of cotton, delivered to the defendant by plaintiff at Lunenburg plantation, parish of Rapides, Louisiana, for carriage from that point to New Orleans, Louisiana.

Suit was first instituted in the civil district court for the parish of Orleans, State of Louisiana, but was subsequently removed to the circuit court of the United States for the eastern district of Louisiana, on the application of the defendant, on the ground that it was a corporation created by and organized under certain acts of Congress (R., 5–6).

In the circuit court the defendant pleaded, first, the general issue, and under the reserve of this plea it set up that the cotton was received by it, to be transported and deliv-

ered under certain bills of lading; that the cotton was destroyed by fire while in possession of the defendant; all other allegations of the petition were denied.

The answer further set up that the bills of lading, under which the cotton was shipped, stipulated that the defendant should not be liable for any loss or damage to it by fire, and this exemption was specially pleaded and set up; there was a further denial that plaintiff had any interest in the suit, for the reason that he had already assigned or parted with the interest in favor of an insurance company or insurance companies, unknown to defendant (R., 9–10).

On the trial of the cause it was proven that no insurance had been procured on the cotton, and hence there were no policies to assign (R., 29).

Subsequently, on the trial of the cause, there was a verdict and judgment for the defendant.

At the trial bills of exception were taken by the plaintiff, first, to the refusal by the court, upon the whole of the testimony and evidence, both for plaintiff and defendant, to instruct the jury to find a verdict for the plaintiff; second, to the action of the court in directing the jury to find a verdict for the defendant upon the whole of the testimony and evidence, both for plaintiff and defendant, and, third, to the refusal of the court, upon the whole of the testimony and evidence of both plaintiff and defendant, to submit to the jury and allow it to pass upon the question whether or not the loss or destruction of the cotton by fire was due to or caused by defendant's negligence.

All as is shown by the bills of exception Nos. 1, 2, and 3, found in the Record, at pages 15–34 and 46.

The whole of the testimony and evidence introduced and filed by both plaintiff and defendant was annexed to and made part of the bill of exception No. 1. This evidence included the bill of lading in question, issued by defendant to plaintiff, the third paragraph of which contained the following stipulation, to wit:

"That neither the Texas & Pacific Railway Co., nor any connecting carrier handling said cotton, shall be liable for damage to, or destruction by fire," * * * (R., 18).

The case was carried by writ of error to the circuit court of appeals of the United States, fifth circuit, by which the judgment of the circuit court was affirmed. The judgment of the former court, by writ of error, is brought here for review, jurisdiction being found upon the fact that The Texas and Pacific Railway Co., defendant, is a corporation created by certain acts of Congress, and hence this is a case arising under the laws of the United States.

ASSIGNMENTS OF ERROR.

The following are the assignments of error in this case:

1. That the circuit court of appeals erred in affirming, upon the whole of the evidence introduced by plaintiff and defendant, the action of the circuit court in directing a verdict for the defendant.

2. That it also erred in directing a verdict for defendant and withdrawing consideration of the evidence from the jury; also in directing the jury to find a verdict against plaintiff.

3. That it also erred in affirming the action of the circuit court in refusing to allow plaintiff to submit to and argue before the jury the question of the neglegence of the defendant, by reason of which plaintiff claimed the destruction by fire of his cotton.

4. That the circuit court of appeals was likewise in error in holding that the evidence found in the record did not show negligence on the part of the carrier; that the court

should have held the contrary, and have reversed the judgment of the circuit court brought before it for review on the ground that the alleged negligence of the defendant was amply sustained by the evidence.

5. That the circuit court of appeals should have held that the circuit court committed error upon its refusal, upon the whole of the evidence in the case, to direct a verdict for the plaintiff.

6. That it was likewise in error in affirming the refusal of the circuit court to direct the jury, upon the whole of the evidence in the case, to find a verdict for the plaintiff.

7. That the circuit court of appeals erred in affirming the action of the circuit court in refusing to allow the submission of the case to the jury on the question whether or not, upon the whole of the evidence before it, the destruction of plaintiff's cotton complained of was due to the negligence of the defendant.

8. That upon the whole of the evidence offered in the case and adduced before the jury it was clearly shown that the destruction of plaintiff's cotton was caused by the negligence of the defendant, from the liability of which the law does not permit it to stipulate that it should be exempt.

9. That the circuit court of appeals also erred in affirming the action of the circuit court in holding that the loss of said cotton was not due to the negligence of defendant.

SYLLABUS.

In order to be binding upon the shipper a contract limiting the common-law liability of a carrier must be upheld by a valid consideration.

Hutchinson on Carriers, sec. 278.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. Cases, 273.

In Louisiana, where the consideration is denied, and the evidence leaves its existence or reality in doubt, the burden is on the carrier to prove the consideration.

Mossop *vs.* His Creditors, 41 La. Ann. Rep., 297.

The validity or effect of the exemption is determined by the law of Louisiana.

Liverpool, etc., Co. *vs.* Phœnix, etc., Co., 129 U. S., 397–453.

Where proof of one of the facts in issue is peculiarly within the knowledge of one of the parties, the burden of proof is shifted to the party who has special knowledge as to the controverted fact, and he must establish it by evidence.

King *vs.* Adkins, 33 La. Ann. Rep., 1057–1065.

School Board *vs.* Trimble, 1073–1079.

Where a bill of lading, or contract, limiting the liability of the carrier, contains no statement of the rate paid, the whole limitation is void.

Kellerman *vs.* Kan. City, etc., R. Co., 68 Mo. App., 255–275.

Contracts limiting the common-law liability of carriers are not favored by the law, and they are not binding on the shipper unless fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.
Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482.

In order to be valid, such contract must be the choice of the shipper, and not of the carrier; the shipper must be allowed an option or opportunity to select under which, the common-law or limited liability, he will ship his goods; if such free choice or option is not allowed him, the contract is not reasonable, and therefore is void; both rates, that for transportation under the common-law liability and that under the limited liability, must be free to the shipper in order that he may have real liberty of choice in making the selection between the two; otherwise, the contract limiting the liability is not fair or reasonable, and therefore is void.

Atchinson, etc., Co. *vs.* Dill, 56 Am. & Eng. R. Cases, 376.
Dovignac *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.
Lewis *vs.* Great Western R. Co., 3 Q. B. Div., 195; 47 L. J., Q. B. Div., 131.
Car *vs.* Lancashire, etc., Co., 21 L. J., Exch. 261; 7 Exch., 707.
L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372–375.

A carrier is not permitted to so limit its liability as to exempt it from the consequences of its own negligence.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.
The Tanbark, 23 Fed. Cases, 680, case No. 13742.

Where there is a clause limiting the liability of a carrier it bears the burden of proof to show not only that the cause

of the loss was within the exemption, but also that it was not due to its negligence or that of its servants.

South, etc., Co. *vs.* Henlin, 56 Ala., 606 (23 Am. Dec., 598).

Inman *vs.* South Carolina R. Co., 129 U. S., 128–139.

Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550–555.

Dillard *vs.* L. & N. R. Co., 2 Lea (Tenn.), 288.

Steele *vs.* Townsend, 37 Ala., 247.

Adams Exp. Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving not only the exemption, but also that the loss was not due to the carrier's negligence, or omission of duty, in any manner causing or contributing thereto.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 397.

Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

This rule has been affirmed by decisions of Federal courts.

New Jersey, etc., Co. *vs.* Merchants' Bank, 6 H., 383.

Seiller *vs.* Pac. Co., 21 Fed. Cases, 1042, case No. 12644.

Ormsby *vs.* Union Pac. Co., 4 Fed. Rep., 706–712.

The exemption from loss or damage by fire is not effective unless the fire be the proximate cause of the loss or damage.

Condict *vs.* Grand Trunk R. Co., 54 N. Y., 500–504–505.

Proximate cause of the loss here was not the fire, but defendant's negligence, which preceded it and without which the fire would not have occurred.

The delivery of goods for shipment at a place where the carrier has consented to receive them for transportation is a complete delivery to the carrier, and when this is done its liability for the goods is that of a common carrier.

St. Louis, etc., Co. *vs.* Murphy, 60 Ark., 337 (30 S. W., 419).

Dixon *vs.* Georgia, etc., Co., 110 Ga., 173 (35 S. E., 369).

I. C. R. Co. *vs.* Smiser, 38 Ill., 354.

Greenwood *vs.* Cooper, 10 La. Ann. Rep., 796.

Barrett *vs.* Salter, 10 Rob. (La. Rep.), 424.

Fitchburg, etc., Co. *vs.* Hanna, 6 Gray (Mass.), 539.

A special contract exempting the carrier from liability in specified instances is to be used by it against any claim of liability as to which it was designed to furnish protection.

So. Pac. R. Co. *vs.* Arnette, 111 Fed. Rep., 849–852.

Where goods are delivered for shipment at a place designated by the carrier, and before being ladened, and while in such place, they are stolen or destroyed, the carrier is guilty of negligence, if it makes no provisions against such theft or destruction, and is liable to the shipper for the value of the goods.

Hutchinson on Carriers, sec. 89.

Fisher *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), 120.

Barrett *vs.* Salter, 10 Rob. (La. Rep.), 434.

Roth *vs.* Harkson, 18 La. Ann. Rep., 705.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 399.

If the carrier negligently leaves goods in a place of danger, he cannot by stipulation exempt himself from liability for loss by fire.

McFadden *vs.* Railway Co., 92 Mo., 343.

ARGUMENT.

Upon the whole of the testimony and evidence heard and adduced on the trial of this cause plaintiff was entitled to a verdict in his favor.

The testimony shows (R., 21–28) that the cotton was brought by a gang of laborers employed on the Lunenburg plantation and working under the superintendent of the place to Meeker's Switch, which was on the plantation; that under plantation superintendence, the cotton was loaded into two box cars of the defendant, which it had brought there for the purpose of receiving the cotton; that after the latter was stored in the cars the doors of the latter were closed and locked by the superintendent of the plantation; that thereupon he proceeded to Lecompte, the nearest station of the defendant to Meeker's Switch, at which it maintained neither station nor agent, and there obtained a bill of lading for the transportation of the cotton to New Orleans, the bill of lading being the same described in the petition; that the loading of the cotton was completed at about 2.30 o'clock in the afternoon, and the bill of lading delivered to the plantation superintendent at Lecompte by the agent of defendant at about 5.30 o'clock the same afternoon.

About 10 o'clock on the night following the cars containing the cotton were discovered to be on fire. There was no agent or other representative of the defendant present at the place at the time of the fire. Both the cars and the cotton were unguarded and unwatched, being left on the track in an open field. There was no water or other appliances to extinguish the fire or to save the cotton or any portion of it.

R., 21–28.

From the time the cotton was loaded on the cars of defendant, which had been sent by it for the express purpose,

of receiving the cotton for transportation, or, in any event, from the moment defendant issued its bill of lading for the cotton, about 5 o'clock on the day on which the cotton was loaded, the latter was in the possession of the defendant as a common carrier, for the safety of which defendant was from that moment responsible as such carrier.

The defendant having thus voluntarily assumed, as regards the cotton, the responsibility of a carrier, it was required to take such measures as might be necessary to safeguard and protect the property from loss or damage, and the failure to take such precautions was negligence on the part of the defendant.

The assignments which charge error in the refusal to direct a verdict for the plaintiff, in instructing the jury to find a verdict for the defendant, and in refusing to allow the case to go to the jury on the question of defendant's negligence, may be conveniently argued together.

Primarily it was the duty of the defendant to transport plaintiff's cotton, under its common-law liability, as a carrier, which is practically that of an insurer, and, if the plaintiff so required, this the defendant would have been obliged to do. It was the right of the plaintiff to exact this or to have made his election to ship under the limitation of defendant's common-law liability after he had been given an option to choose between the two.

In support of this proposition, however, argument at greater length and authorities will be made and cited hereafter.

In his petition plaintiff set out the exemption clause of the bill of lading, but averred that he was not bound by it, and that the same was null and void, for the reason that he received no consideration for the granting of the exemption, and that the rate of freight was the only one which the defendant could give, and that the fire which destroyed the cotton was due to the negligence of the defendant, its servants or employees.

It has been decided that in order to support a stipulation of exemption of a common carrier from any liability for the loss of goods destroyed by fire there must have been some consideration, other than the mere contractual relation of the parties, moving from the carrier to the shipper, and contracts of exemption, like all other contracts, required a consideration to support them.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. R. Cases, 273.

The clause of a bill of lading by which a carrier is exempt from loss due to specific causes, to be valid, must be upheld by a consideration.

If a carrier seeks to evade liability by reason of a special contract, it must be made to appear that the carrier had a higher rate for contracts of carriage under its common-law liability than for the same under its limited liability.

The validity or effect of the exemption is to be construed by the law of Louisiana.

Liverpool, etc., Co. *vs.* Phœnix Ins. Co., 129 U. S., 397–453.

Under the law of Louisiana, while the denial of a consideration of a contract does not of itself require the party relying on the contract to prove the consideration, yet, when the evidence leaves the existence or reality of the consideration in doubt, the burden is on the obligee to sustain it by proof.

Mossop *vs.* His Creditors, 41 La. Ann. Rep., 297.

So far as concerned the plaintiff here, the evidence shows that he received from the defendant, without objection on his part, a bill of lading containing an exemption from the carrier of any liability from loss by fire. The plaintiff received or was paid nothing as a consideration for this agreement. If there was such consideration it was a fact pecu-

liarly, if not entirely, within the knowledge of the defendant, and to which it had offered no evidence.

In Louisiana, under the circumstances detailed above, where a party fails to furnish evidence which is clearly within his power, all presumptions of law are against him.

King *vs.* Atkins, 33 La. Ann. Rep., 1057–1065.

Under these circumstances the burden of proof is shifted to the party who knows the fact inquired about and can establish it by evidence.

King *vs.* Atkins, 33 La. Ann. Rep., 1065.

School Board *vs.* Trimble, 33 La. Ann. Rep., 1073–1079.

It has also been decided that where the bill of lading or contract containing the limitation of liability is blank or contains no statement as to the rate paid that the whole limitation is void.

Kellerman *vs.* Kan. City, etc., Co., 68 Mo. App., 255–275.

The bill of lading in this case contains no statement at all as to the rate of freight charged. The blanks left for this purpose are not filled out, so that the bill of lading itself furnishes no information at all as to the rate which was charged for the transportation. The recitals of the bill of lading in this regard are the following, to wit:

"Other rate per 100 lbs..... $ "
"Total freight..... $ "
"Advance charges..... $ "
R., 18.

It would therefore seem that the charges for carriage did not appear on the bill of lading, and hence the stipulation of non-liability was void.

Contracts limiting the common-law liability of carriers are not favored by the law, and in order for such a contract

to be binding on a shipper it must be fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.
Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482.

The carrier would be obliged to receive plaintiff's cotton, under its common-law liability, if the shipper insisted upon it.

Wallace *vs.* Matthews, 99 Am. & Eng. R. R. Cases, 473.

A contract of carriage containing a clause limiting the liability of the carrier, to be valid, must be the choice of the shipper, and not of the carrier; it is necessary that the shipper should have been allowed an opportunity or option to select under which, the common-law liability or the limited liability of the carrier, he would ship his goods; if such choice or option is not allowed him, the contract is not fair nor reasonable, and is, therefore, void; even in regard to the consideration, it must appear that both rates of transportation, that of the common-law liability and that under the limited liability, were offered the shipper and were reasonable, and that he had a genuine freedom of choice in making his selection as between the two.

Atchison, etc., Co. *vs.* Dill, 55 Am. & Eng. R. R. Cases, 376.
Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.

A carrier cannot limit its liability at all unless the shipper has been given an actual freedom of choice between the different kinds of contract under which the company will carry the goods, and this even where the shipper does not demand different terms.

Little Rock, etc., Co. *vs.* Cravens, 55 Am. & Eng. R. Cases, 650.

It was the duty of the defendant, within whose knowledge the facts lay exclusively to make it clear, that it did not make the same charge for carrying under its common-law liability as it made for transportation under its limited liability.

Michigan, etc., Co. *vs.* Haile, 6 Mich., 257–258.
L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372.

It is the rule in Louisiana that where a carrier seeks to avail itself of a clause in a bill of lading exempting it from liability for fire, and this exemption is not disputed in the case stated, the defendant carries the burden of proof that the loss was not due to the company's negligence, or to any omission of duty which in any manner caused or contributed to the loss.

Maxwell & Putnam *vs.* Railway Co., 48 La. Ann. Rep., 385–397–398.

Carriers are liable for the loss or damage for things intrusted to their care, unless they can prove that such loss or damage is occasioned by accidental or uncontrollable causes.

R. C. C. of Louisiana, 2754.

Also, carriers are subject, in respect to the safe keeping and preservation of the things intrusted to them, to the same obligations and duties as are tavern-keepers, in the title of the Code of "Deposit and sequestration"

R. C. C. Louisiana, 2751.

And turning to this title we find that an innkeeper is responsible for any of the effects which are stolen either by its servants or agents, or by strangers going or coming into the inn.

R. C. C. Louisiana, —.

The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

R. C. C. Louisiana, 2937.

And this latter provision is to be rigorously enforced where it has been agreed that the depositary shall have a reward for preserving the property.

R. C. C. Louisiana, 2938.

Where the property is lost or destroyed, the liability of the carrier must be governed by the provisions of R. C. C., 2967, which makes it liable for the effects which are stolen by strangers, and it can be said in the present case that the defendant, who made a charge not only for carrying, but also for the preserving the cotton while in its cars on its own tracks awaiting transportation, should have used the same care in preserving its own property. Where the cotton was loaded upon and locked in its own cars provided for this purpose, the cotton was left practically abandoned as to all protection in an open field in the night-time.

The burden of proving the reasonableness and fairness of the stipulation limiting the company's liability was upon the carrier itself, and it was unreasonable save when a fair and genuine option has been given the shipper to choose the kind of contract or the rates of freight under which he should ship.

Lewis *vs.* Great Western R. R. Co., 3 Q. B. Div., 195; 47 L. J., Q. B. Div., 131.

Atchison, etc., Ry. Co. *vs.* Dill, 55 Am. & Eng. R. R. Cases, 376.

A carrier cannot force upon the consignor a contract limiting the carrier's liability. The consignor may refuse to accept such a contract and insist upon the company taking his goods subject to the general liability of common

carriers, and this implies that he must have an option or chance of making his selection before or at the time of their refusal or allowance.

Carr *vs.* Lancashire, etc., Co., 21 L. J. Exch., 261; 7 Exch., 707.

The defendant offering its service to the public as a common carrier, and enjoying advantages and franchises as such, must be ready to do the business of a common carrier, with the measure of responsibility imposed by the common law; but it may, at the same time, offer to do the same business under a limited liability, the limitation being fair and reasonable and resting upon a full consideration. An offer or readiness to transport the goods of its customer with one or the other degree of responsibility, it has been held, is as little as can be required of any common carrier; less than this does not present a *bona fide*, reasonable alternative.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372, 375.

It is not shown here, nor was it attempted to be shown, that the plaintiff was offered any opportunity to choose between the two kinds of contracts—whether he would have shipped his cotton at his own risk, at a lower rate, or at the company's risk, at a higher rate. He was told that the company had but one rate and but one kind of contract, which of course deprived the shipper of any option or choice of his own at all, and left him the alternative of either shipping his cotton under such conditions as the company chose to make or not shipping it at all.

It is the settled law that a carrier is not allowed to so limit its liability as to exempt it from the consequences of its own negligence or that of its servants.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.
The Tanbark, Federal Cases, No. 13742.

In New York Central R. Co. *vs.* Lockwood, 17 Wall., 357, it is declared that a contract of exemption is valid only where there is no negligence of the carrier. If this be the law, before the latter can have the benefit of the exemption it must show that the exemption falls within that class of cases in which its liability can be limited. This would require it to show affirmatively that it was guilty of no negligence as a prerequisite to the exemption having any effect whatever.

17 Wall., 357–384.

The burden of proof was on the defendant to show that the exemption was given in the case where it was permissible, and this could only be done by proof that the defendant itself was free from negligence, because, as to this, there could be no exemption stipulated at all.

Inman *vs.* South Carolina R'w'y, 129 U. S., 128–139.
Duvenick *vs.* Mo. P. R. R. Co., 57 Mo. App., 550–555.
Dillard *vs.* L. & N. R. R. Co., 2 Lea (Tenn.), 288.
Steele *vs.* Townsend, 37 Ala., 247.

In Louisiana the liability of a carrier for its own negligence is an exception to the instances in which it can stipulate for the exemption from liability. It therefore must show that the exemption stipulated has reference to a permissible case—that is, in which it had been guilty of no negligence.

Maxwell & Putnam *vs.* S. R. R'w'y Co., 4 La. Ann. Rep., 397.
Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

This rule has been affirmed by some of the Federal courts.

N. J. Steam Navigation Co. *vs.* Merchants' Bank, 6 How., 383.
Seiler *vs.* Pacific Co., 21 Fed. Cases, No. 12644, p. 1042.
Ormsby *vs.* Union Pac. R. Co., 4 Fed. Rep., 706–712.

The loss must be the proximate cause of the fire.

Condict *vs.* Grand Trunk R. Co., 54 N. Y., 500–504–505.

Pierce *vs.* So. Pac. Co., 40 L. R. A., 350–354.

The fire in this case was not the proximate cause of the loss of the cotton; this latter was the negligence of the defendant in failing to take measures to guard or watch the cotton and precautions against the occurrence of the fire, and also in failing to provide sufficient means or assistance to save the cotton, or a portion of it, after the fire began.

Moreover, if there was a failure to take measures to prevent the fire in the first instance, this would be negligence of the company, against which the exemption would not apply; if there was a like failure to prevent the entire or partial destruction of the cotton by fire, after it started, this would be an intervening cause of damage, subsequent to the commencement of the fire, and, hence, would not be the proximate cause of the loss.

The delivery here to the defendant was complete, so far as to subject defendant to all of the liabilities of a common carrier.

St. Louis, etc., Co. *vs.* Murphy, 60 Ark., 333 (30 S. W., 419).

Dixon *vs.* Ga. Central R. Co., 110 Ga., 173 (35 S. E., 369).

I. C. R. Co. *vs.* Smiser, 38 Ill., 354.

Greenwood *vs.* Cooper, 10 La. Ann. Rep., 796.

Barrett *vs.* Salter, 10 Rob. (La.) Rep., 424.

Fitchburg, etc., Co. *vs.* Hanna, 6 Gray (Mass.), 539.

The burden of proof was on the defendant here to show that it was free from negligence in order that the exemption relied upon can be given effect.

South., etc., Co. *vs.* Henlin, 52 Ala., 606 (23 Am. Dec., 598).

Adams Express Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

It has been decided that a special contract exempting the carrier from liability in specified instances is to be made use of by the carrier for any alleged dereliction of duty, against which it is designed to afford protection.

So. Pac. R. Co. *vs.* Arnette, 111 Fed. Rep., 849–852.

In the present case, however, assuming that it was not the duty of the defendant to first prove itself free from negligence in order to show that the contract of exemption was operative as being made in an instance in which the law did not forbid it, the condition of the evidence unquestionably shows that the plaintiff was entitled to go to the jury at least on the question of defendant's negligence, which was established beyond a doubt; it appears that the cotton was loaded into box cars of the defendant, sent by it expressly to the switch in an open field, for the purpose of receiving the cotton for carriage; that at this point, where the cotton was laden, the defendant maintained no station and kept no agent, or other representative; that the cars containing the cotton were thus left unwatched, unguarded, and there is no claim of any care being taken by defendant to protect the cars and cotton from depredation, and that the cotton was left in this condition, uncared for, from five o'clock in the evening until about ten o'clock in the night, when it was discovered, with the cars, to be on fire; the cotton was in the possession of the company at the time, as is un-

questionably shown by its bill of lading, previously issued, and as would manifestly result from the fact of its being loaded under the circumstances.

In Louisiana, where the transaction occurred, it has been decided that a carrier, under conditions shown by the evidence here, was guilty of negligence; thus:

In Fischer *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), p. 120, it was held that where cotton was sent by plaintiffs to be shipped on board a vessel, received late in the evening, suffered to remain on the levee during the night of delivery and was consumed by fire, that the carrier was responsible for the value of the cotton; that although the cotton had been received late in the evening, defendant having received and receipted for it, its responsibility must be governed by the same rules as if it had been delivered early enough to put it on board the same day; *proof that it was customary to leave cotton exposed on the levee without any person to watch it* was not a good excuse for the carrier; such a custom could not control the law and would not be recognized by the courts of justice.

In Barrett *vs.* Salter, 10 Rob. Rep. (La.), 434, it was held that where a carrier receipts for goods left on the levee they are as much at his risk as if actually laden on board of the vessel, and that the latter would be responsible for any damage sustained by the goods while left in such condition; that from the moment the carrier receipted for the property in good order the ship became responsible for any damage subsequently discovered. (See page 437.)

The case of Fischer *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), p. 120, was quoted approvingly by the supreme court of Louisiana in 1896, in the suit of Maxwell & Putnam *vs.* Railroad Co., 48 An. (La.), p. 399.

All that is declared by Fischer *vs.* Brig Norvall was reaffirmed in Darrell *vs.* Southern Pacific, 47 An. (La.), p. 1455.

In Roth *vs.* Harkson *et al.*, 18 Annual (La.), 705, cotton was delivered on the levee to be laden on board a vessel for

shipment; the vessel declined to receipt for the cotton on account of the late hour of the day; the cotton was lost and the ship was sued for it; it was held liable, and it was declared (page 706) that the cotton had been unloaded upon the wharf, covered with a tarpaulin, under the instructions of the mate, the captain, or the clerk; that in this condition the cotton was received by the carrier and in charge of the vessel; that the delivery was consummated and could not be recalled; that the ship had incurred the obligation imposed upon carriers and watermen; that the plaintiff had parted with his possession as custodian of the cotton by delivering the same to the brig; that it thereafter became a matter between the brig and the employer of plaintiff, the owner of the cotton.

And to the same effect is the law outside of the State of Louisiana.

The liability of a carrier commences whenever and as soon as the goods have been delivered to and accepted by him, solely for transportation, although they may not be put immediately *in itinere*, but are at first, for his own convenience and preparatory to the voyage or journey for which they are intended, temporarily deposited in his wharf or storeroom; in such cases the deposit is a mere accessory to the carriage, and does not postpone his liability as a common carrier to the time when they shall be actually put in motion towards their place of destination.

Hutchinson on Carriers, sec. 89, citing 6 Gray, 539.

If the delivery be made at the warehouse of the carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may occur in awaiting the departure of trains, the railroad becomes, the moment the delivery is made, a carrier as to the goods, and its responsibility as such attaches at once.

Hutchinson on Carriers, sec. 89, citing Wade *vs.* Wheeler, 47 N. Y., 658.

Grand Tower Co. *vs.* Ullman, 89 Ill., 244.

If the parties agree that the goods may be deposited for transportation at any particular place, without express notice to the carrier, such deposit will be sufficient delivery; and proof of a constant and habitual practice of the carrier to receive goods when they are deposited for him in a particular place without special notice of such deposit is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between parties by which the goods, when so deposited, shall be considered as delivered to him without further notice; and delivery upon a private wharf or dock upon which it has been the carrier's custom and constant usage to receive goods left there for transportation is considered as a sufficient delivery, though the goods were not left in charge of any of its servants.

Hutchinson on Carriers, sec. 90.

The responsibility of the carrier is in complete existence from the time delivery is made.

Hutchinson on Carriers, sec. 94.

If the carrier negligently places or leaves goods in a place of danger, he cannot by a stipulation exempt himself from liability for loss by fire.

McFadden *vs.* Railroad Co., 92 Mo., 343.

It is quite evident that the defendant incurred the obligations of a carrier when the cotton was loaded upon its cars, with its consent, for the purpose of being transported to New Orleans. Surely its liability commenced at 4 o'clock in the evening, when it delivered to plaintiff's agent its bill of lading for the cotton. The duty to safeguard the cotton after it came into the possession of the defendant was as much a part of its duty as its conveyance and delivery. Whenever the situation or condition of the goods is such as to require special care or attention the carrier must do for them all that might be reasonably expected from a prudent

and careful person, or, if he chooses to do otherwise, it is at his risk, which he is considered as voluntarily assuming by his failure to exercise requisite care and caution. His duty being to safeguard the goods, he must to this end do all that is made necessary by their situation or condition, and, if he fails to do this, must be considered as assuming the risk of all the resulting perils. If the goods are exposed to danger of any kind he must afford protection against such danger, and if he has taken no steps towards furnishing protection he assumes the responsibility for all dangers that might have been avoided by proper care and diligence.

The circuit court was of the opinion that defendant was exonerated from all risk of leaving the cotton in its exposed condition, because the shipper had full knowledge of the situation in which it was left; that the plaintiff having voluntarily submitted his goods to a danger well known to him, he could not, under the circumstances, recover; it must be considered that the plaintiff also knew that the cotton was left where it was, not at his own risk, but at that of defendant, and, if the latter chose to take no measures for its protection, that it would be responsible to him for any loss or damage to the cotton which it had engaged to safely carry from Meeker's Switch, and to deliver it in good order to plaintiff in New Orleans; no case can be imagined where the shipper was without knowledge that the carriage of his property would be accompanied with some risk, yet, under the ruling of the circuit court, in any case where the shipper has such knowledge, he cannot recover from the carrier, no matter however gross the negligence of the latter might be; if the plaintiff had left the cotton where he did, at his own risk of any danger of fire, he would presumably have taken some steps to protect it, for instance, by having it guarded or watched; but knowing that as soon as the cotton passed into the possession of the defendant by being loaded on its cars at 2 o'clock in the evening, or by the issuance of its bill of lading at 4 o'clock,

it was no concern of his if by defendant's want of care the cotton was lost or destroyed. Surely the plaintiff was charged with no duty concerning the safeguarding of the cotton after it came into defendant's possession. If the company chose to leave the cotton unprotected, it may have considered this was unnecessary or more expensive than it would have been to have had it guarded. It assumed the risk by leaving the cotton unprotected; it had the right to do so if it so desired. The cotton itself was of no more value to plaintiff than the responsibility of defendant for its value, and such was its liability as soon as the cotton was received by it. Defendant's knowledge that the cotton was left exposed was accompanied with the further knowledge that if lost or destroyed in consequence of this condition that defendant would owe him its value. If his consent to leave the cotton where it was is to be inferred, this inference would fairly and logically include, as a condition or a consequence, that defendant would be liable for the cotton if it were lost by its failure to properly protect it; in other words, if lost by its negligence.

The judgment of the circuit court should be reversed.

Respectfully submitted.

BRANCH K. MILLER,
WILLIAM S. PARKERSON,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK,
Plaintiff in Error,

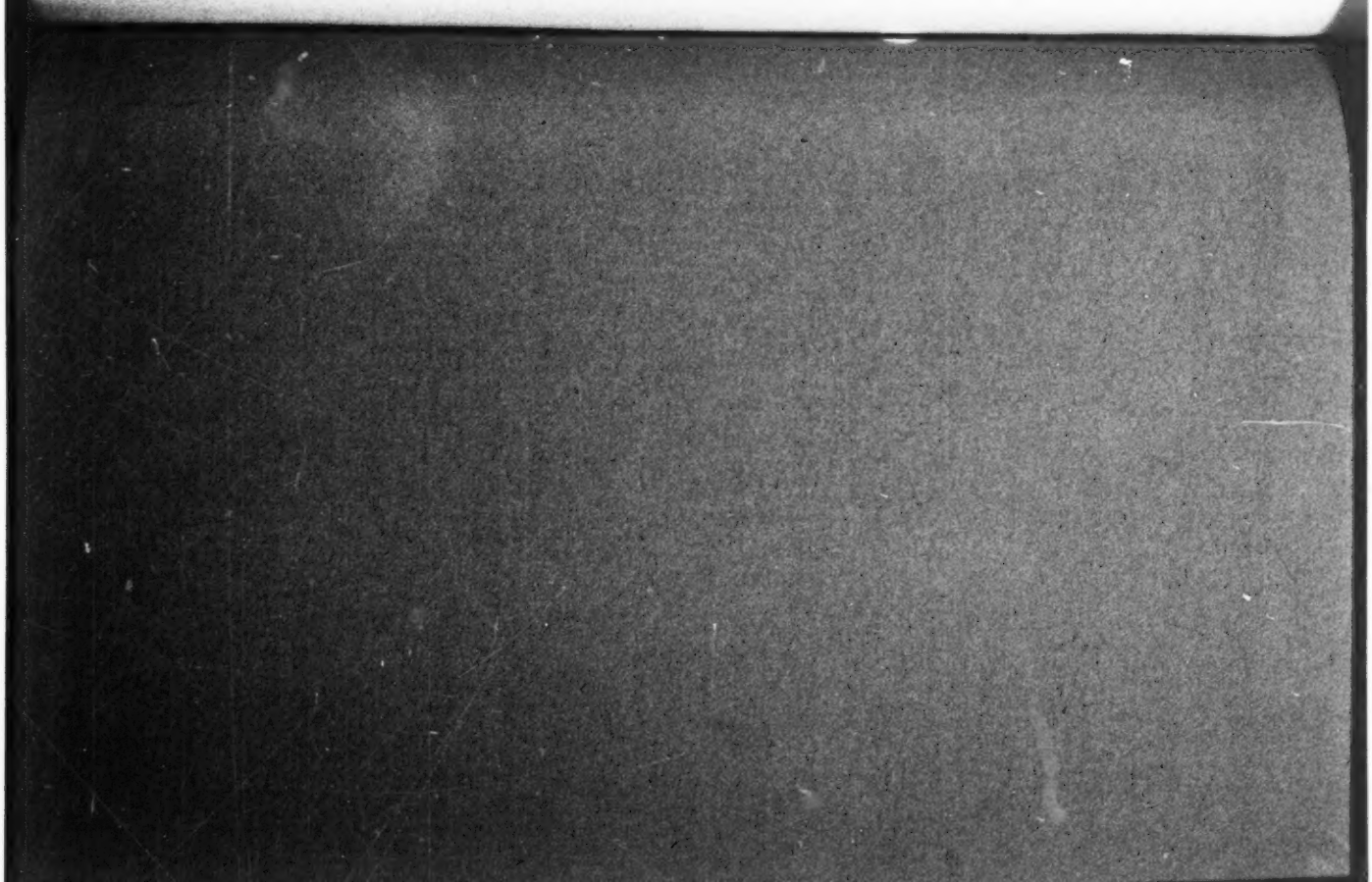
vs.

THE TEXAS AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WM. WIRT HOWE,
CHAS. P. COCKE,
W. B. SPENCER,
JOHN F. DILLON,
Attorneys for Defendant.

C. G. Burroughs, Walker and Centre Streets, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK,
Plaintiff in Error,

VERSUS

THE TEXAS AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Proceedings.

This suit was commenced in the Civil District Court for the Parish of Orleans, by Henry Charnock, the plaintiff in error, against the Texas and Pacific Railway Company, the defendant in error. Upon petition of the defendant in error, it was removed to the United States Circuit Court for the Eastern District of Louisiana. The object of the suit is to recover $2,440.32, being the alleged value of certain bales of cotton delivered to the defendant in error, as a carrier, for transportation from Meeker's Switch, a point on its line in the Parish of Rapides, La., to New Orleans.

The plaintiff in error alleges that said 52 bales of cotton were delivered to the defendant in error, on December 26, 1900, at Meeker's Switch, to be carried as aforesaid for a rate of freight then and there agreed upon, and that the said defendant in error *then and there* delivered to the agent of the plaintiff in error its bill of lading for the carriage of said cotton as aforesaid. That the said cotton, after it had been so received by the defendant in error as a common carrier, and while it was in its possession as such for transportation as aforesaid, and after the bill of lading for said cotton had been issued by the defendant in error and delivered to the plaintiff in error, with the exception of one bale thereof, was destroyed by fire while same was loaded upon the cars by defendant in error, standing upon its track at said Meeker's Switch, awaiting carriage aforesaid.

As the bill of lading in question contained a clause exempting the carrier from liability for loss or damage to said cotton by fire, the plaintiff in error endeavored to avoid the effect of this clause by alleging that same was null and void and not binding upon him for the following reasons, to-wit:

1. That he received no consideration of any character whatsoever for the inclusion of said clause in said bill of lading, and that he received no consideration of any character whatsoever sufficient to uphold said agreement restricting or limiting the liability of said Company as it exists under the common law;

2. That the stipulated freight which he agreed to pay and which the Company charged for the carriage of said cotton, was the only rate that it would give, or

was offering, or that could have been obtained by him for the carriage of the cotton from Meeker's Switch to New Orleans; and

3. That the destruction of said cotton was due to the negligence of the Company in that it left said cotton standing in two cars of the Company in the open country, unguarded and unwatched, which was a breach of its duty to take proper precaution to protect said cars and the cotton therein contained from depredation, loss or injury by third persons, wrongdoers, or those bent upon mischief (Transcript, pp. 2–4).

The defendant in error in its answer admitted that on the date above mentioned it received and undertook to transport and deliver upon the terms and conditions expressed in a certain contract or bill of lading, which was then and there entered into between it and the agent of the plaintiff in error; and admitted that the cotton was destroyed by fire while in its possession, but denied all other allegations of his petition in reference thereto. It specially pleaded the fire clause in its bill of lading and relied thereon as relieving it from responsibility for the loss of said cotton. It also denied that the plaintiff in error had any real or substantial interest in the suit, in that he had transferred all of his interest to some insurance company. This last defense, however, was abandoned on the trial (pp. 9, 10).

At the close of all the evidence introduced on behalf of either party, the plaintiff in error moved the Court to instruct the jury to find a verdict in his favor. The

defendant in error made a counter-motion requesting the Court to direct the jury to find a verdict for the defendant. After the Court had declined to direct a verdict in favor of the plaintiff, and had stated that it would direct a verdict for the defendant, the plaintiff then requested the Court to submit the case to the jury on the question, whether or not, under the evidence, the loss of said cotton by fire was due to the negligence of the defendant, but the Court refused to submit the case to the jury, not only because he thought the verdict should be for the defendant, but also because, after requesting the Court to direct a verdict in his favor, it was inconsistent for the plaintiff in error to ask the Court to submit the case to the jury. Exceptions were duly noted by the plaintiff in error to the charges, and to the refusal to charge, of the Court.

Statement of Facts.

The facts of this case may be briefly detailed as follows :

The plaintiff was the owner of the Lurenburg Plantation, situated in the Parish of Rapides, La., about two and a half miles from the line of the railway of the defendant in error. On December 26, 1900, the cotton in question was brought by a gang of laborers employed on said plantation under the direction of the manager of the plaintiff from Lurenburg Plantation to Meeker's Switch by a tramway. Meeker's Switch was not a regular station or depot of the company, but was an ordinary spur track, connected with the railway of the defendant in error, for the accommodation and use of the Meeker Plantation.

The nearest station was Le Compte, about two miles and a half west of the spur track. After the cotton was thus brought to Meeker's Switch, it was unloaded from the tramcars, and under the supervision of the manager of the plaintiff in error, it was ranged upon the ground, and from there, under his direction and control, was loaded upon two box cars of the defendant in error, which had been at his request placed upon this spur track for the purpose of receiving the cotton. After the cotton was loaded upon the cars, the manager of plaintiff closed and locked the doors of the cars. The loading was completed about 2:30 o'clock P. M., on December 26, 1900, and after which, the manager of plaintiff and his laborers went to dinner. After dinner he proceeded to Le Compte Station, and there notifying the agent of defendant that the cars were loaded and ready for transportation, received without protest or question or request for any modification of the bill of lading, from the agent at Le Compte station, the bill of lading offered in evidence, at about 5:20 o'clock P. M. The first train of the defendant in error that was due at Meeker's Switch to take this cotton was No. 70, which was due to arrive there at 9 o'clock A. M. the next morning (December 27th). At about 10 o'clock on the night of December 26th, one of the cars was discovered to be on fire, and efforts were made by the people in the neighborhood to put same out, but they were unsuccessful. From the manner in which the cars were burning it was evident that they had caught on fire from the interior (Trans., p. 26), and were burning so fiercely that only one bale of cotton could be saved therefrom.

The evidence further showed that the defendant in

error maintained no station at Meeker's Switch, nor had any agent there, nor were any of its employees located there. It had an ordinary platform and a spur track running out through the open field towards the Meeker Sugarhouse, which was situated about half a mile from the main track. It was not a regular station of the Company, and no watchmen or agents were kept there, such persons, by rule of the Company of long standing and of universal application, being kept only at regular stations. The fact that such had been the custom of the company was well known to shippers at Meeker's Switch, and was well-known to the plaintiff. This custom and usage was admitted by the plaintiff's own witness, F. G. DROUET, who testified that he had always kept his own watchman (Tr., p. 26). It was not shown by the evidence that the Company had been guilty of any delay in moving these cars, nor that any train which could have taken them had passed that point between five o'clock in the afternoon, when notice was given and the bill of lading was issued, and ten o'clock, the time that the cotton was destroyed.

The evidence does not disclose the manner in which the fire originated. Mr. F. G. DROUET, who lives about a quarter of a mile from where the cars were placed, says that about ten o'clock on the night in question, before retiring, he stepped out of his room onto the back gallery, and as he stepped out he noticed the glare of a fire about a quarter of a mile away. That he then went to one of his employees and asked him if he had had any fire in the scale house that day, and received the reply that he had not. It then occurred to him that it must be the cars

of cotton on fire, and he immediately gave the alarm and ran to where the cars were standing. On reaching there he found the first car nearest the track on fire, and one of the doors was open. His attention was then drawn to an empty box car ahead of the two cars containing the cotton, and he shoved that one out of reach in order to save it. He then unlocked and opened the door of the second car loaded with cotton, and discovered that that was also on fire in the interior. No suggestion whatever is made by any witness as to the manner in which the cars caught fire, or as to the time at which they caught on fire; and it will be noted that while the door of the first car was found open the doors of the other car, which was also on fire in the interior, were securely locked (p. 26).

Opinions of the Lower Courts.

As a matter of convenience, we insert here the opinions delivered by the trial Judge and by the Court of Appeals. The main trial of the case in the Court of first instance took place on May 13, 1901, and at the close motions were made, both on behalf of the defendant and the plaintiff, for verdicts. Judge PARLANGE took the matter under advisement and, the next morning, stated as follows:

" Both the plaintiff and the defendant have moved the court to direct the verdict. As to the condition of things thus created and the effect of such cross-motions, see Mr. Justice WHITE as the organ of the court, in Beuttell vs. Magone, 157 U. S., page 157.

" I am perfectly clear that the stipulation in the bill of lading exempting the carrier from loss by fire is valid. See Woods on Railroads, vol. 3, sec. 425; Hutchinson on Carriers, 2nd ed'n., sec. 278; Am. and Eng. Enc. Law, 2nd ed'n., *verbis* 'Carriers of Goods,'

vol. 5, page 288, *et seq.*, specially page 293; 72 N. Y., p. 90. Of course, the carrier could not have provided against his own negligence, or that of his servants, and that point is not involved in this case.

"I am equally clear that the burden of proving that the loss of the cotton was caused by the negligence of the carrier, is upon the plaintiff. See the Reeves' case, 10 Wall., p. 189, and the Downer case, 11 Wall., p. 129, leading cases of the highest authority which have laid down the rule invariably followed by the Federal courts.

"The plaintiff relies on the case of V. & A. Meyer & Co. vs. R. R., 41 La. An., p. 639. But that case was decided solely on a point entirely different from any issue in this cause. In that case, the court pointedly said (at page 642): 'The liability of the Company to the plaintiffs in the present case rests solely on their failure to ship at the proper time.'

"The defendant cites the case of R. R. vs. Wood, by the Supreme Court of Alabama, 66 Ala. Rep., page 167; also reported in 9 Am. and Eng. R. R. Cases, page 419. This was an action for the loss of freight put out by the carrier at a flag station where the carrier had no agent or other servant, the goods being stolen after they had been put off and left by the carrier. In that case the court said: 'When the consignee was informed that there was no agent of the company there (at the flag station) he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied condition (Wells vs. R. R., 6 Jones (N. C.), 47).' This reasoning applies with great force to the present cause.

"It is shown without dispute that Meeker station is a flag station. That a person wanting box cars there applies to the nearest station, at Lecompte, about 2½ miles from Meeker. That the shipper loads them and then goes to the agent and obtains his bill of lading, whereupon the next train passing the flag station takes the cars. The shipper well knows that the carrier has no guard or watchman at Meeker and does not expect that the carrier will guard the freight at Meeker. All of this is plainly shown by the plaintiff's own evidence and there is no dispute whatever concerning it.

"The loading of the box cars with cotton was completed about 2 p. m. The bill of lading was obtained

about 5 p. m. and the cotton was discovered to be on fire about 10 p. m. The train which was to take the cars was not due till about 9 a. m. the next morning. After loading the cars the servants of plaintiff abandoned the loaded box cars.

"At the argument of the motion to direct a verdict the only case relied upon or cited on behalf of the plaintiff was Meyer & Co. vs. R. R., *supra*, since then, Fisher vs. Brignoval, 8 N. S. (La)., 120, and other cases have been cited for plaintiff. None of them, in my opinion, present the conditions of the cause at bar.

"This is not a case where the shipper expects care and custody of his goods by the carrier. On the contrary, it is a case where he well knows that the carrier will not guard the goods, and the shipper accepting this situation, without protest, and failing himself to guard the goods, it would seem that either on the ground of assent, or the ground of having assisted in bringing about the loss, or for both of these reasons, the shipper could not recover. It is testified that there were tramps and other passersby at Meeker, such as there are on all railroads, but this evidence comes from the plaintiff's witness and as he knew of this danger—if it was a danger—the inquiry naturally arises whether the plaintiff having voluntarily submitted his goods to a danger well known to him, can recover under the circumstances of this case. Another consideration might be, whether it was not entirely unnecessary to allow the cotton to remain unprotected at the flag station from 2 P. M. to 9 A. M. the next day. It may well be that the cotton could have been loaded the next day prior to 9 A. M.

"The defendant's counsel argues with great force that even if it be held that the carrier was at fault, there is absolutely no proof that the neglect alleged was the cause of the fire. Of course, it would not be sufficient for plaintiff to show negligence in this cause, but it would be essential for him also to show the relation of cause and effect between the negligence and the loss.

"The only negligence claimed by plaintiff is the failure of the carrier to have a guard at Meeker. Of course, it is not claimed that it was the duty of the carrier to have on hand at Meeker, apparatus or other means for the extinguishment of fires. Defendant's counsel argues that there is no proof whatever, that even if the carrier had had a guard or guards at Meeker, the fire would not have happened. And this

contention seems to have great force. On careful consideration of the whole case, I am clearly of opinion that a verdict must be directed in favor of the defendant company" (pp. 31–33).

In refusing a motion by plaintiff for a new trial, Judge PARLANGE said:

"The whole argument on the motion for a new trial seemed to turn on the question whether or not the burden of proving negligence, as also a casual connection between the negligence and the damage, was on the plaintiff. I am clear that the burden of such proof was on the plaintiff. In the first place, there was no proof, in my opinion, of any negligence under the particular facts of this case. Then, even if it were held that there was proof from which the jury could have found negligence, it is very clear that there was absolutely no proof that the negligence (which, of course, could only be the failure of the railroad company to guard the cotton) was the cause of the fire. Counsel for the defendant company suggested in argument several conditions of things under which the fire could have taken place even if the defendant company had had a guard to watch over the cotton. Of course, the jury could not have been permitted to reach a conclusion by guessing.

"See the following authorities:

R. R. vs. Reeves, 10 Wall, 189.
Transportation Co. vs. Downer, 11 Wall., p. 129.
Clark *et al.* vs. Barnwell *et al.*, 12 How., 272.
Rich *et al.* vs. Lambert *et al.*, 12 How., 347.
Christie vs. The Creighton, 41 F. R., 62.
Pacific Coast S. S. Co. vs. Bancroft-Whitney Co. *et al.*, C. C. A., 94th F. R., 181.
Crowell vs. Union Oil Co.. C. C. A., 107 F. R., 302.
Hutchinson on Carriers, 2d Ed., Secs. 764 and 767.
Platt vs. Richmond, &c., R. R., 108 N. Y., 358.
Germania Fire Ins. Co. vs. M. & C. R. R. Co., 72 New York, p. 90.
Wood on Railroads, vol. 3, page 1886. (Minor's Ed. of 1894.) See. 129, U. S., 442.

As to burden of proof in Louisiana:
2 Robinson, 402.
17 Annual, 9.
24 Annual, 101.

"As to the difference between the origin of a fire which consumes a thing and the cause of the loss of the thing (see 71 Fed. Rep., 485, Thomas vs. Lancaster).

"In a suit for a negligent injury, it is not sufficient to show that the negligence and the injury co-existed, but it must be shown that the negligence caused the injury. *Post hoc ergo propter hoc* is not sound logic. Justice CAMPBELL, in Illinois Central R. R. vs. Cathy (Miss. case, 12 South. Rep., p. 253). Also C. C. A., (71 F. R., 484 and 485). There are very numerous texts and authorities on this point.

"The motion for a new trial must be overruled" (pp. 33, 34).

IN THE COURT OF APPEALS, the following opinion was delivered in affirmance of the rulings of the trial Judge:

(Before PARDEE, MCCORMICK and SHELBY, Circuit Judges).

"BY THE COURT: This was an action very similar to that of Jovite Cau against the same defendant, just decided. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause, identical in terms with that given in the Cau case. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for ten or eleven years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its character and the other conditions at the time of handling, but no agent or employee of the Company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long es-

tablished practice was for shippers who had produce to be transported from that point to notify the nearest station agent of the fact and of the number of cars desired, when the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. **There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading.**

" We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier nor as to the loss falling within the terms of the fire exemption clause. If there was negligence on the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not, in our opinion, tend to show such negligence. This case falls clearly within the authority of Clark *et al.* v. Barnwell *et al.* (53 U. S., 272) ; Transportation Company v. Downer (78 U. S., 129) ; York Company v. Central Railroad (70 U. S., 107).

"The judgment of the Circuit Court is affirmed" (pp. 44, 45).

ARGUMENT.

We do not deem it necessary in this brief to discuss the second and third bills of exception (3d and 4th Assignments of Error), inasmuch as the counsel for the plaintiff in error, at the close of the testimony, moved the Court to direct a verdict in his favor, and it is settled that such a motion must be based upon the fact that there is no conflict in the evidence upon any material question of fact, and precludes the party making same from thereafter requiring the case to be submitted to the jury.

Beuttell vs. Magone, 157 U. S., 154.
Angier vs. Ins. Co., 71 N. W. Rep., 761.

We think it only necessary to discuss the first bill of exception (Assignment of Error No. 2).

The motion of defendant in error to direct a verdict in its favor was based upon two grounds :

1st. That the clause in the bill of lading exempting the defendant in error for the loss of or damage to said cotton by fire, was a valid stipulation assented to by the plaintiff in error, and relieved the defendant in error of liability unless the plaintiff in error, on whom the burden was, showed that it had been guilty of negligence. That the evidence did not show that the defendant had violated any duty that it owed to the plaintiff in error, and it was not, therefore, shown that it had been guilty of negligence.

2d. That even if the defendant in error owed the plaintiff in error the duty to have placed and maintained a watchman over said cars pending transportation, and was therefore negligent in that respect in not doing so, yet, it was incumbent upon the plaintiff in error to prove that such negligence was the direct and proximate cause of his loss, which he failed to do. In other words, that the plaintiff in error must establish by proper evidence the causal connection between the negligence charged and the injury suffered.

FIRST POINT.

The fire clause in the bill of lading is a valid and binding stipulation unless negligence of the carrier be alleged and proven. The evidence adduced fails to show negligence.

As stated above in his petition, the plaintiff in error attacked the validity of the fire clause in this bill of lading upon the grounds, *first*, that no consideration of any character whatsoever had been received by him for the limitation of liability; and, *second*, specially that no reduction of rate had been or would have been given to, or could have been obtained by the plaintiff in error for the transportation of this cotton. And the learned counsel for the plaintiff in error devoted much time in the lower Courts to the accumulation of argument and authority to show that such a stipulation is invalid unless a consideration was given to the shipper therefor, or unless the shipper was permitted a fair option to ship under the common law liability or the limited liability, as he saw fit.

In answer to all this, we desire, in the first place, to call the Court's attention to the fact that there is not a scintilla of evidence in the record touching or relating to, or in the most remote manner bearing upon the question of the consideration of this contract other than gathered from the terms of the bill of lading itself. Nor is there any evidence whatsoever in the record that the plaintiff in error, or any one representing him, applied for, or even desired, the option of

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shipping under the common law liability of the carrier. Nor is there any evidence in the record that this option was not actually tendered him by the agent of the defendant in error. In fact, the record is perfectly barren on this subject.

It is hornbook law that he who pleads the nullity or invalidity of a contract on the ground of a want or failure of consideration, or fraud, or duress, must allege and prove the facts essential to establish his plea.

It is equally elementary, as well under the common as the civil law, that in commutative contracts, a sufficient consideration is presumed to have passed until the contrary be established by proof.

York Mfg. Co. vs. Ry., 3 Wallace, 107.

We shall, therefore, dismiss from consideration the question of the invalidity of this clause for want of consideration or duress.

Its reasonableness has been sustained too often by the Supreme Court of the United States to now be open to question.

R. R. Co. vs. Reeves, 10 Wallace, 176.
Transportation Co. vs. Downer, 11 Wallace, 129.

We shall, therefore proceed to the discussion of this point upon the assumption that the limitation of liability in this bill of lading was a valid and binding stipulation.

The only ground of negligence charged against the defendant in error, in reference to this cotton, was

" that the said cotton was by it left in two cars of the said Company, standing upon its track in the open country, unguarded and unwatched by the Company in any particular whatsoever; that it was the duty

of said Company to take some measures of precaution to protect said cars and the cotton contained therein from depredation, loss, or injury by third persons, wrongdoers, or those bent upon mischief; that it utterly failed and neglected to take any measures of precaution for the safety and protection of said cotton, but left it in said cars on said track, unguarded and unwatched in the night time, during which it was destroyed by fire. * * *" (Record, p. 4.)

In brief, the charge of negligence is that the defendant in error failed to have a watchman to guard said cars after loading, and while same were awaiting transportation.

Negligence is a relative term, and whether or not certain facts show negligence depends upon all the surrounding circumstances of time, place and condition. In order for the plaintiff in error to establish the negligence of the defendant in error in failing to have a watchman guard the cotton while awaiting transportation, it is essential that he should show that there was a duty imposed upon the carrier, by agreement, express or implied, to maintain such a watchman. It is not pretended that there was an express agreement to that effect; so that if any duty rested upon it to do so, it was implied from the nature of its calling, or from the surrounding condition of affairs. While it is true that, generally speaking, the duty rests upon the carrier to safely transport and deliver goods tendered to it for carriage, yet this duty is not absolute or without limitation or qualification. What constitutes safe delivery; what constitutes proper care, depends upon custom, and depends upon the surrounding circumstances of each case. Formerly the undertaking of a carrier for the transportation of goods to a given destination embraced a personal delivery to the

consignee or his authorized agent. Now, universal custom has settled it as being the more reasonable rule in regard to railroads that a personal delivery to the consignee is not required. Their routes are in a measure fixed, and cannot be varied to suit the convenience or accommodation of a particular shipper. It is manifest that they cannot, in the proper performance of their duties to the public, undertake to have, except at regular and proper intervals, stations where they maintain agents, stop their trains and transact their business. To require otherwise would be to burden the carrier with much useless expense and cause useless delays, and in the end make the expense of and delay in transportation of freight burdensome to the shipper.

If, therefore, as in the present case, for the accommodation of some particular shipper or shippers, the carrier agrees to receive or deliver freight at a place other than a regular station, it has the perfect right to do so under such conditions, not oppressive or unreasonable, as it may see fit to establish. It might, for instance, require such a shipper himself to load his freight in the cars ; or might refuse to transport it except on certain trains ; or might require him to be present personally, or by authorized agent, to receive it from or deliver it to the carrier ; or might require the shipper to assume the risk of theft or damage pending its actual receipt for transportation while deposited at or near the company's railroad. Such conditions, moreover, can be established as well by custom as by positive agreement, with this limitation : that such conditions if created by custom, to be binding upon the shipper, must be understood by him to exist, or knowledge thereof must be so

general as to charge him with knowledge of the existence thereof.

If, with full knowledge, actual or implied, of the conditions under which the carrier receive or delivers freight at such a place, one assumes to deal with it, there is an implied acquiescence or agreement on his part to such conditions. Thus, if a shipper knew, or the circumstances were such that he is held to have known, that at a certain place on the carrier's route, where there was no agent or employee of the company to receive same, goods delivered were customarily deposited on a platform, and that it was incumbent on the consignee to see to their care thereafter, it could not be charged that the carrier in so acting had violated any duty it owed him should the goods be subsequently lost. There is an implied agreement on his part with the carrier that it should so deliver, and in doing so, it would have performed its full duty towards him.

A case in point is *R. R. Co. vs. Wood, 66 Ala., 167 (9 Am. & Eng. R. R. Cases, 419).* In that case, Wood sued the carrier for loss of 74 bushels of corn shipped by him to one Moss at Jemison Station on the line of the defendant company, and which he alleged the carrier failed to deliver. The station in question was a flag station where no agent was maintained, so the car was placed on the side track there, and some of the corn was lost. The Court, speaking through Mr. Justice SOMERVILLE, said:

"In the present case, as shown by the evidence, it was distinctly understood at the time of the shipment of the corn in controversy that the South & North Alabama Railroad Co. had no agent at Jemison Station, which was a mere flag station, to which the car-

load of corn was consigned. It was equally well made known that there was neither agent nor station at Smith's Mills, where it was agreed that the corn must be delivered. The question presented for our decision is: Did the safe delivery of the car containing the corn on the side track at the station where it was agreed to be received, terminate the liability of the Railroad Company as a common carrier?

"The law does not require of railroad companies the absolute duty to construct or keep warehouses at every station along their route of travel or transportation. They are required only to do the best their means will enable them to do under existing circumstances, and must act in accordance with the reasonable necessities of their usual business (Redfield on Carriers, Sec. 120). We can see no reason why a railway company acting as a common carrier cannot stipulate by a contract, express or implied, that their liability as a carrier shall terminate with the delivery at a particular point, and that they assume no liability at all in such cases as warehousemen.

"If the consignee is fully advised at the time of shipment that the Company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved when he has done all that the nature of the case permits him to do according to the reasonable and proper usages of his business.

"The delivery of the carload of corn on the side track at Smith's Mills terminated the liability of appellant. It would be unreasonable to require the Railroad Company to employ a special agent to keep the corn in further custody, unless there was agreement, express or implied, to do so. When the consignee was informed that there was no agent of the Company there, he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied conditions. Wells vs. Wilmington R. R. Co., 6 Jones (N. Car.), 47."

This we believe to be a correct exposition of the law of the instant case and decisive of the issue in favor of the defendant in error.

In the instant case, Meeker's Switch was a mere spur track jutting out from the main track of the Company, running through an open plantation field to a sugar house about a half of a mile distant from the main track. There was no station-house at this place. The trains of the Company did not stop there, except upon notice that loaded cars were awaiting transportation there. No watchman or other employee was maintained at that place. The shippers loaded their own freight in the cars, which were left there only when requested.

In fact, the evidence shows that the Railroad Company did not exercise, and had never exercised the slightest control over the reception of freight at that point, leaving it entirely to the shipper to load the cars at such time as he saw fit, and to take such precautions as he saw fit in regard to the custody or care of same after loading until same were taken away by a train of the Company. This custom of the Company had been in existence ever since Mr. PAUL, the witness for the defendant, had been Division Superintendent, some eleven years. That it was well known to and understood by all people shipping at that place is evidenced by the testimony of Mr. DROUET (Tr., p. 29), the Manager of the Meeker Plantation, on which this spur track was situated :

Q. Had it been the custom of the Texas & Pacific Ry. Co. to have a watchman down there to watch the cars?

A. No, sir; we had our own watchman at our sugarhouse.

Q. It was generally known to all that the Railroad Company had no watchman down there?

A. Yes, sir.

Q. But there is no station agent there?

A. No, sir.

Q. There has never been one there?

A. No, sir.

Again on page 31:

By Mr. Miller:

Q. Did the Railroad Company maintain a station at Meeker's Switch?

A. It is a flag station, but they put the mail off there.

Q. Has the Railroad an agent there?

A. No, sir.

Q. There is nobody there in charge of it at all?

A. No, sir.

Q. Meeker's Switch is what—an open field or what?

A. It is right in the open field, on our plantation, that comes in from the main line of the Texas & Pacific Railroad.

Q. It is not protected or enclosed in any way? It is just in the open country?

A. Yes, sir.

By Mr. Spencer:

Q. In other words, it is just like any other spur track in the country; running from the main line out to some sugarhouse in a field?

A. Yes, sir.

We think it, therefore, clear under the facts as disclosed by this record that the plaintiff delivered these two cars to the defendant on this switch with full knowledge of the fact that the defendant in error would not undertake to guard or protect them in any way whatsoever, and there arose from his knowledge of these facts an implied agreement on his part that, if the Company accepted delivery of these cars at this flag

station, they should not be required to place and keep a guard over them, and he cannot now complain that their failure to do so was a breach of any duty owing to him, and if there was any reason to believe that the cotton was liable to be injured or destroyed by third persons or evildoers of any kind, the plaintiff could more readily have had same protected by his own watchman than could the Railroad Company. We hardly think it a fair argument to charge that the Railroad Company failed to exercise due care in leaving this cotton unguarded in an open field, if we assume that the plaintiff himself was a prudent man, who, knowing that the Railway Company would not, and had never been in the habit of guarding cotton, should leave it in such a condition unprotected.

There is nothing unreasonable in the custom of the company in this respect, so far as these spur tracks are concerned. On the contrary, we think it would be extremely unreasonable, as it would be extremely burdensome to the defendant in error, if it were required to place and maintain a watchman at every spur track along its sixteen hundred miles of road, to guard cars, which, for the convenience of some special shipper, were placed thereon,

The learned Judge *a quo*, in expressing his views in passing upon the motion of the defendant to direct a verdict, said:

"This is not a case where a shipper expects care and custody of his goods by the carrier. On the contrary, it is a case where he well knows that the carrier will not guard the goods, and the shipper, accepting

the situation without protest and failing himself to guard the goods, it would seem that either on the ground of assent or the ground of having assisted in bringing about the loss, or for both of these reasons, the shipper could not recover. It is testified that there were tramps and other passers-by at Meeker, such as there are on all railroads, but this evidence comes from the plaintiff's witness; and as he knew of this danger, if it was a danger, the inquiry naturally arises: whether the plaintiff, having voluntarily submitted his goods to a danger well known to him, can recover under the circumstances of this case?" *(ante,* p. 9).

We submit that the case of *Fischer vs. Brig Norvall, 8 Martin (N. S.), 120,* so confidently relied upon by the plaintiff in error on this question, is not applicable to the facts of this case; for, while it might be true that to leave cotton uncovered and exposed over night on the public wharves of the City of New Orleans without guards or protection of any kind, might be the grossest negligence, it would be perfectly consistent with prudence to leave cotton stored and locked and sealed in a box car on a plantation sidetrack; and if the plaintiff and his employees can be considered prudent men, they set an example which the defendant in error had a right to follow.

We, therefore, submit that the plaintiff in error failed to sustain the burden of proof which was upon him to show the negligence of the defendant.

SECOND POINT.

Even though the defendant in error owed the plaintiff in error the duty to have placed and maintained a watchman over said cars pending transportation, and was therefore negligent in that respect in not so doing (which we deny), yet it was incumbent upon the plaintiff to prove that such negligence was the direct and proximate cause of his loss, which he failed to do.

If, for the sake of argument, we admit that there was negligence on the part of the Company in not maintaining a watchman to guard said cars pending the arrival of the train which was to carry them into New Orleans, this fact standing alone would not be sufficient to justify a verdict against the defendant in error, for it is perfectly well settled that, in a suit for a negligent injury, it is not sufficient to show that negligence and injury co-existed, but it must be shown that the negligence caused the injury. In other words, there must be a causal connection between the negligence and the injury.

In *Railroad Company vs. Cathy, 12 Southern Rep., 253*, Chief-Justice CAMPBELL said :

" It is not enough that the negligence of the employer and injury to the employee co-existed, but the injury must have been caused by the negligence, and the fact that injury to an employee occurred after the negligence, is not sufficient to show the relation of cause and effect between them. *Post hoc ergo propter hoc* is not sound as evidence or argument. Nor is it sufficient for a plaintiff seeking recovery for alleged negligence by an employer towards an employee to show a possibility that the injury complained of was

caused by negligence. Possibilities will not sustain a verdict. It must have a better foundation. * * * The evidence of the plaintiff is wholly insufficient to establish any necessary or even probable connection between the negligence of the defendant, testified to by the witness for the plaintiff, and the hurt of Cathy. He may have suffered his injury as the result of the thing spoken of, but no man can say that he did, or that it is probable that he did. His business was a perilous one, in which the most experienced and cautious are liable, under the most favorable conditions, to suffer injury and meet death, which lurks in a thousand forms and claims its victims when least expected oftentimes. It is just as probable from the evidence that Cathy fell from some one of the many causes that might have caused it, as that he stumbled over coal, or uneven rails, or from his pants being caught by a piece of the rail which was said to project from it at right angles, which latter is said by counsel to have been the most probable cause of his fall. It is all pure guessing—the merest conjecture as to how the accident was produced, and the evidence for the plaintiff fails to do more than to suggest several ways in which it might have occurred. But what caused it is unknown, except as indicated by what the unfortunate man said; that is, that he fell down between the cars and the wheels passed over him. * * * But, we have considered the case as if all was proved which the plaintiff's evidence, accepted as true, tends to prove, and thus viewed, there is a wide chasm between the matters referred to as the cause of the hurt and the injury received. This chasm has no bridge but conjecture, which is insufficient to maintain a jury in crossing to a verdict in any case. It must, therefore, have been leaped by the jury, moved by sympathy for the dead son and the living, sorrowing father, and excited by the eloquence of counsel dealing with so pathetic a theme."

In the case of *Marande vs. Texas & Pacific Ry. Co., 42 C. C. A., 317*, where the destruction of the cotton sued for was claimed to have been caused by the negligence of the defendant in that it did not maintain a sufficient number of watchmen to properly guard

same; in that it permitted a locomotive to come in close proximity to the cotton; and in that proper care was not exercised in the extinguishment of the fire after discovery—the Court said:

"As the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil disposed persons in the vicinity who might have set fire to the cotton, and that the defendant, by keeping a large force of watchmen at its wharf, might have more efficiently protected its property from risks, are facts that may be assumed to be proved by the evidence. But the facts did not prove, nor tend to prove, that the fire actually was the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand, the place where it was shown that the fire started raised a persuasive inference against the theory of an incendiary origin, because it started at the most unlikely and dangerous place for the operation of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value, but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals. No fact was elicited to prove that the locomotive engendered risk beyond its mere presence, and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation."

The following authorities are to the same effect:

R. R. Co. vs. Reeves, 10 Wallace, 189.
Transportation Co. vs. Downer, 11 Wallace, 129.
Clark vs. Barnwell, 12 How., 272.
Rich vs. Lambert, 12 How., 347.
Platt vs. R.R., 108 N. Y., 358.
Steamship Co. vs. Bankrupt, 94 Fed., 484.
Thomas vs. Lancaster Mills, 71 Fed., 481 at 484.

We refer to two other illustrative cases, one in the Court of Appeals in New York and the other in the Supreme Court of the United States, showing the application of the principle in support of the proposition for which we are contending. The first is the celebrated case of Laidlaw vs. Sage (158 N. Y., 76), in which the plaintiff claimed that, although the defendant was not responsible to him for the consequences of an explosion caused by a third party in the defendant's office, yet he was entitled to recover for the injuries which he sustained by reason of his being unlawfully moved from one position in the office to another by the defendant. The testimony in the case showed that the explosion of a quantity of dynamite had entirely wrecked all parts of the office, a large room 30 by 26 feet, and injured persons in different parts of the office. The contention of the defendant was that to send the case to the jury upon the question of whether the plaintiff was injured more in a particular spot than he would have been 18 or 20 inches to the right or left of that spot was to give the jury nothing but the merest conjecture, guess or speculation. On the part of the plaintiff it was claimed that there was some testimony as to the lines of explosion, the fractures of the beams or joists in the floor of the office, and some matters of that sort which would entitle the jury to find that the plaintiff would have been less hurt if allowed to remain at the place where he was standing before it is claimed the defendant moved him, than he was hurt at the place to which the defendant moved him; and upon the submission of the evidence to the jury, the jury rendered a verdict of $40,000 in favor of the

plaintiff. Upon this point, after citing a large number of authorities, at page 97, the Court says:

"Thus we see that this court has, in a long line of decisions uniformly held that to justify a submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find the defendant moved him. No one can read the evidence in the record as to the nature, power and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact. Under such circumstances to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of JUDGE GRAY, 'to withdraw from the litigant a safeguard intended for the protection of his rights.' We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant."

The other illustrative case to which we refer is Patton vs. The Texas & Pacific Railway Co. (179 U. S., 663), in which the unanimous opinion of this Court was delivered by Justice BREWER. From that opinion we make the following extract:

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, *Stokes v. Saltonstall*, 13 Pet., 181; *Railroad Company v. Pollard*, 22 Wall., 341; *Gleeson v. Virginia Midland Railroad*, 140 U. S., 435, 443, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence (*Texas & Pacific Railway v. Barrett*, 166 U. S., 617). Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the emoloye is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe."

Has the plaintiff in error established the casual connection between the alleged negligence, viz.: the absence of a watchman, and the injury, viz.: the destruction of the cotton? Clearly not.

The origin of the fire is shrouded in mystery. When, how, or by whom it was set is unknown and unexplained. Whether it had been burning for hours prior to its discovery at ten o'clock by MR. DROUET, or had just caught when seen by him; whether it had been smouldering unseen and undiscoverable for hours before, or whether it burst into a furious blaze at the moment when he saw it, is unexplained. Whether it was set by some of the plaintiff's own laborers while loading the car in the afternoon; or whether the car was burst open by one, or a dozen, or a hundred evilly-disposed persons and set on fire, is unsettled. Whether the persons setting fire to same were so numerous or determined that it would have required one or a dozen watchmen to protect the property, is unknown. Whether the fire in its incipiency was so small and so readily discoverable that a single watchman present, without special appliances, could have arrested its progress, or whether the cotton burst into flames with such fury, or caught in such a manner as not to be readily discoverable until it had passed control, are matters not cleared up by the evidence. So far as the evidence discloses, this cotton might have been set on fire by some of the plaintiff's employees while loading same in the cars, and it might have smouldered along in this closed and sealed car without anyone having been able to discover its presence until the whole car burst into flames. Or, again, it may have burned so fiercely from the very start that a dozen of men could not have put it out, even had they been present on the scene when it first caught. The plaintiff has left it entirely to conjecture as to how this fire originated; as to whether in the exercise of proper care the defendant in error could have discov-

ered it, even though it had a watchman present; or having discovered it, could have extinguished it by the exercise of proper diligence. To have submitted this case to the jury under the evidence adduced, would have been to authorize them to have a guessing contest as to whether or not the absence of this watchman had anything to do with the destruction of the cotton. It seems to us rather a persuasive and pertinent fact, indicating that the fire was set while the cars were being loaded, that one of the cars, though locked and sealed, was on fire in the interior. This fact points more strongly to the negligence of the plaintiff's employees in loading than it does to the negligence of the defendant in error.

We, therefore, submit that the plaintiff has failed to show that the absence of a watchman was the cause of the destruction of his cotton, and, in conclusion, we submit that the Circuit Court properly directed a verdict to be entered for the defendant on the record so made up, and the Circuit Court of Appeals properly affirmed its action.

WM. WIRT HOWE,
CHAS. P. COCKE,
W. B. SPENCER,
JOHN F. DILLON,
Attorneys for Defendant.

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Supreme Court of the United States.

No. 194.

HENRY CHARNOCK

vs.

THE TEXAS & PACIFIC RAILWAY CO.

SUPPLEMENTAL BRIEF FOR DEFENDANT.

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
CHARLES P. COCKE,
Of Counsel.

T. H. THOMASON PRINT, 820-822 NATCHEZ ST.

Supreme Court of the United States.

No. 194.

HENRY CHARNOCK

vs.

THE TEXAS & PACIFIC RAILWAY CO.

SUPPLEMENTAL BRIEF FOR DEFENDANT.

I.

We recall attention to the decision rendered by Mr. Justice White in Beuttell vs. Magone, 157 U. S. 154, 157, and its effect on this case. As pointed out by the learned trial Judge, transcript, p. 31, both parties having asked the court to direct a verdict, their action was a request that the court find the facts, and they are therefore concluded by the finding made by the court upon which the resulting instruction of law was given. The facts having been thus submitted to the trial court, the appellate tribunal is limited in reviewing its action to a consideration of the correctness of the finding on the law, and must affirm if such finding be supported by any evidence, the conditions being similar to those in Lehnen vs. Dickson, 148 U. S. 71, and

Runkle vs. Burnham, 153 U. S. 216. This rule would seem to control the case in our favor. The facts stated by the trial Judge fully support his ruling.

II.

In this case it might be useful for the Court to notice the methods of business in Louisiana and Texas in the matter of spur tracks or switches leading to factories, sugar houses and cotton gins and warehouses. They are very numerous, and it may be stated that on the line of the Texas & Pacific Railway Company they number not less than twelve hundred. They are not required by any common law rule, but are for the convenience of the shipping public, and represent the important economies of modern transportation. Cars are set out at shipper's request on these spurs and loaded by the shipper. The shipper then goes to the nearest railway station and obtains a bill of lading. In the instant case the plaintiff pursued this course, pp. 21, 27. He loaded his cotton on the two cars standing in the open field, p. 28. The spur, known as Meeker's Switch, had been there a long time. It was generally known that there were no watchmen on the spur, p. 26, and no agent; and the rule in this respect as to this and the other spurs was of long standing and universal application, p. 30.

It is not even claimed that the Railway Company could keep fire apparatus at such a place, p. 33. Shipments from plantation spurs are irregular and infrequent, and it would be a great extravagance to maintain watchmen on such spurs, and such unnecessary expense would in the last result fall on the public. The fact that such spurs have existed and have been operated for years without watchmen, and in such method, has been

well-known to shippers, and their assent is implied. There was no law requiring the Railway Company to furnish such conveniences, and when furnished it is but just that they should be used by shippers on the conditions upon which they are supplied.

III.

The authorities cited by the plaintiff cannot prevail against the well-settled jurisprudence of this Court as well as of the Supreme Court of Louisiana. We have a right to rely on such decisions in this Court as N. J. Steam Nav. Co. vs. Bank, 6 How. 384; Clark vs. Barnwell, 12 How. 272; Railroad vs. Reeves, 10 Wallace, 176; Transportation Co. vs. Downer, 11 Wallace, 129; and the other federal cases found in the opinions of the Courts below. As for the Supreme Court of Louisiana it has adhered to the same rule and relied upon the same authorities.

Price vs. Uriel, 10 La. An. 413.

Thomas vs. Morning Glory, 13 *Id.* 269.

N. O. Ins. Co. vs. R. R. Co., 20 *Id.* 303.

In Thomas vs. Morning Glory, the Court followed the above case from 6th Howard, 384; and noted that Mr. Justice Campbell, then of the Supreme Court of the United States, had laid down the same rule at Circuit in New Orleans. And the Court applied to a person accepting a bill of lading, with an exception, the sensible rule that "in whatever manner a man has bound himself he shall remain bound," p. 270.

In the instant case the plaintiff loaded his cotton and then applied for and accepted a bill of lading containing the following clause:

"9. That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the owner of said cotton to all the terms and conditions written or printed thereon."

We also refer to the interesting case of Washburn-Crosby Company vs. R. R. Co., 180 Mass. 252.

Respectfully submitted,

WILLIAM WIRT HOWE,
WALKER B. SPENCER,
CHARLES P. COCKE,
Of Counsel.

Supreme Court of the United States.

No. 194.—October Term, 1903.

Henry Charnock, Plaintiff in Error, vs. The Texas and Pacific Railway Company. } In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 16, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

The case was removed from the Civil District Court in and for the Parish of Orleans to the United States Circuit Court for the Eastern District of Louisiana by defendant, on the ground that it was a corporation organized by an act of Congress of the United States.

The petition alleges that plaintiff delivered to defendant, at a point on the line of its railway called Meekers' Switch, to be transported to New Orleans, fifty-two bales of cotton at a rate of freight then and there agreed upon and a bill of lading issued to plaintiff. The cotton was loaded upon the cars of defendant, and while waiting transportation was destroyed by fire.

The petition charges negligence on the part of defendant in that it failed to take measures of precaution for the safety and protection of the cotton, but left it in the cars on a side track, "in an open country, unguarded and unwatched." The bill of lading contained a provision exempting defendant from liability for damage to or destruction of the cotton by fire, but the petition alleges that the provision was null and void, as far as plaintiff is concerned, for the following reasons, among others: He received no consideration therefor; the rate which he agreed to pay was the only rate defendant would give or was offered; on account of the negligence of the defendant.

The value of the cotton was $2,440.32.

The evidence in the case is that Meekers was a mere switch track running to the Meekers plantation. No agent was maintained at the station. Shippers wanting cars applied for them at the next station. The practice was for shippers to load the cars furnished and gets bills of lading from the agent who furnished the cars. The next train passing after the cars were loaded took them; that no guard or watchman was placed over freight was well known.

The loading of the cotton in the present case was completed at 2 P. M. The bill of lading was obtained at 5 P. M. The fire was discovered at 10

P. M. The train which was to take the cars was not due until 9 A. M. next morning. There was no evidence of the cause of the fire.

Defendant moved the court to instruct the jury to return a verdict for it. Plaintiff requested the court to submit to the jury the question whether or not the destruction of the cotton was due to or caused by the neligence of the defendant. The request was denied, and the motion of the defendant was granted, and a verdict was returned for defendant. From the judgment entered on the verdict error was prosecuted to the Circuit Court of Appeals for the Fifth Circuit and the judgment was affirmed. (113 Fed. Rep. 92.)

This case was argued and submitted with *Cau* v. *Texas & Pacific Railway Co.*, and all of its questions are ruled by that case except one, and that is the effect of leaving the cotton unguarded on the responsibility of the defendant.

In answering the question two elements are to be considered—the negligence of the defendant and its connection with the destruction of the cotton. If the evidence established neither, the Circuit Court rightfully directed a verdict for defendant.

Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. Applying that test in the case at bar, we do not think negligence on the part of defendant was established.

Meekers was not a regular station; indeed was not a station at all but a mere switch track. The defendant was not obliged to receive freight there. It was, as said by the Court of Appeals, "a country or plantation switch," established and maintained for the accommodation of the planters of the neighborhood. There was no agent or employe maintained there for the purpose of receiving or guarding freight, nor was there fire apparatus kept. Cars were only sent there when ordered, loaded by the shipper, and taken by the first passing freight train to the point of destination. This was the practice for years, and there is not a word of testimony that it was not adequate to the protection of the planters as it was to their accommodation, or that it was in their judgment not a complete fulfillment of the duty of defendant. No circumstance is shown which demanded a change in the practice. There was no demand made by the plaintiff for a change. Whatever risk there was seems to have been accepted as a consideration for the convenience afforded. It is easy to understand that if watchmen had been demanded of the defendant, it would have insisted upon the delivery of freight at its regular station at Le Compte, two and one-half miles distant. But the risk seems not to have been great. No loss from any cause is shown to have occurred during the existence of the practice—nothing shown from which danger could be apprehended. One of the plaintiff's witnesses testified that tramps passed up and down the road daily, but what can be in-

ferred from that? It is inappreciable. Was danger to be apprehended from their carelessness or malice? During the ten or eleven years of the existence of the station not an instance of either is shown.

It is, however, urged that a place of delivery other than a regular station can be agreed on or established by custom or practice, and at the instant of delivery the full responsibility of a carrier attaches. To bring the case at bar within those principles *Fischer* v. *Norvall,* (8 N. S. [Martin's Law Rep.] 120;) *Barret* v. *Saler et al.,* (10 Rob. Rep. [La.] 434,) and *Roth* v. *Harkson et al.,* (18 An. [La.] 455,) are cited. The principles may be assented to; the cases cited are distinguishable from that at bar.

In *Fischer* v. *Brig Norvall,* thirty-five bales of cotton were sent to be shipped on the brig Norvall, and were received by the captain. The cotton was left upon the levee unguarded, and during the night following delivery it was destroyed by fire. The origin of the fire was not shown, but it was shown that it was not customary in the city (New Orleans) to put a guard over cotton so placed. The code of the State made carriers liable for loss or damage to property entrusted to their care, unless they proved that such loss or damage had been occasioned by accidental and uncontrollable events. The defendants in the case were adjudged liable. The Supreme Court held, approving the decision of the trial court, "there was negligence in the defendants permitting the cotton to be exposed all night on the levee, to theft, fire and other accidents, without some person to take care of it." It was not the care, the court further observed, that a prudent person would take of his own property, and the custom proved was not a good excuse. The facts in that case are markedly different from those in the pending case. Cotton exposed upon the levees of New Orleans is in a different situation from cotton enclosed in locked box cars on a side track in the solitude of the country, and demands a different degree of care.

In *Barret* v. *Saler et al.,* forty hogsheads of tobacco were delivered for shipment on the ship Huron. It was receipted for by the mate. After it was received a heavy rain came, which lasted about two hours, to which it was suffered to remain exposed. It was testified that the captain was told that if the tobacco should be put on board without being opened and trimmed it would be found damaged on its arrival at destination. It was so found. The defendants were held liable.

In *Roth* v. *Harkson et al.,* the question was whether cotton put in a place designated by a mate of a ship and covered by a tarpaulin by the direction of the officers of the ship was delivered to the ship, notwithstanding the officers afterwards refused to receipt for it on the ground of the lateness of the hour, It was held to be a delivery.

The question in the case at bar, however, is, not whether there was delivery to defendant nor when its responsibility attached, but assuming delivery at Meekers and that defendant's responsibility attached at the time

the bills of lading were issued, was defendant guilty of negligence? That question we have answered in the negative, nor could the answer be otherwise, even if it be conceded, as contended by plaintiff, that under the law of Louisiana the burden of proof was upon the defendant to show the absence of negligence. The allegation of the petition was: "That the fire, by which the destruction of said cotton was caused, was due to the negligence of the said company itself, and of its agents, employes and servants; that the said cotton was by it left in two cars of the said company, standing upon its track, in the open country, unguarded and unwatched by the said company, in any particular whatsoever; that it was the duty of the said company to take some measures of precaution to protect said cars, and the cotton contained therein, from depredation, loss or injury, by third persons, wrongdoers or those bent upon mischief; that it totally failed and neglected to take any measures of precaution, for the safety and protection of the said cotton, but left it in said cars, said track, unguarded and unwatched in the night time during which it was destroyed by fire; that petitioner believes that the said cotton was set on fire by some malicious person; that petitioner has no actual knowledge as to the origin or cause of said fire." The evidence we have commented on, and, we may only add, it established all that was charged as negligence, and there was nothing for the defendant to explain. The defendant could, as it did, submit the question of its liability upon the evidence adduced.

Judgment affirmed.

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Test:

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